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The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

The International Trust Company, of the City of Denver, State of Colorado
Appellant.

vs.

The Norwich Union Fire Insurance Society,
Appellee.

No. 902.

Petition for Writ of Certiorari, requiring The Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court for its review and determination the case of The International Trust Company, appellant, vs. The Norwich Union Fire Insurance Society, appellee.

SYLVESTER G. WILLIAMS,
EBENEZER T. WELLS,
MORTIMER F. TAYLOR,

Solicitors for Norwich Union Fire Insurance Society.

O. J. KELLY, PRINTER, DENVER.

IN

The Supreme Court

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OCTOBER TERM, 1895.

The International Trust Company, of the City of Denver, State of Colorado
Appellant,

vs.

The Norwich Union Fire Insurance Society,
Appellee.

THE NORWICH UNION FIRE INSURANCE SOCIETY, PETITIONER.

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION THE CASE OF THE INTERNATIONAL TRUST COMPANY, APPELLANT, VS. THE NORWICH UNION FIRE INSURANCE SOCIETY, APPELLEE.

To the Honorable the Supreme Court of the United States.

The Petition of the Norwich Union Fire Insurance Society respectfully shows to this Honorable Court as follows:

I.

Your petitioner is a corporation organized under the laws of the Kingdom of Great Britain, and is, and was at the time herein mentioned, engaged in the business of fire insurance in the United States and in the State of Colorado, having its principal place of business in the city of New York, but with agencies located elsewhere throughout the United States, and among others a general agency at Denver, Colorado, and a local agency at Pueblo, in the same state.

The International Trust Company is a corporation organized under the laws of the State of Colorado, with its principal place of business at the city of Denver, in said state.

II.

The International Trust Company filed a bill of complaint against your petitioner at the November term, 1893, of the Circuit Court of the United States for the District of Colorado, seeking to enforce the delivery and payment of an alleged policy or contract of insurance in the sum of ten thou and dollars ($10,000) upon a hotel building in the city of Pueblo, which building was destroyed by fire on October 9th, 1893.

Upon the issues joined and evidence taken and hearing had in the Circuit Court, a decree was entered by the Circuit Court by the Hon. John A. Riner, District Judge, in favor of your petitioner, and the bill was dismissed.

From this decree the International Trust Company appealed to the Circuit Court of Appeals for the Eighth Circuit, and the said Court of Appeals, at its December term, 1895, reversed the judgment of the Circuit Court and remanded said cause, with directions to the Circuit Court to vacate its former decree, and in lieu thereof to enter a decree in favor of the complainant below, the said International Trust Company, adjudging that the complainant company held a good and valid policy of insurance in the defendant company on October 9th, 1893, covering the hotel property in question, which, by virtue of its terms and provisions, was payable, in case of loss, to the complainant company.

A petition for a rehearing was duly filed by your petitioner within the time required by law, to-wit: On the 15th day of January, 1896, in the said Circuit Court of Appeals, and said petition was denied. It is from the decree of the Circuit Court of Appeals reversing the decree of the Circuit Court that your petitioner seeks relief and sues for this writ.

III.

A certified copy of the entire record of said cause in the Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with rule No. 37 of this Honorable Court, relating to cases from the Circuit Court of Appeals, and is marked Exhibit "A."

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IV.

The complainant in the Circuit Court, for its cause of action, alleges that your petitioner issued a policy of insurance upon the property in question on August 26th, 1892, for ten thousand dollars ($10,000) for a period of six months, to one John R. Gordon, who was then the owner of the property. That on December 12th following, complainant made a loan to Gordon of $50,000, which was secured by a trust deed made by Gordon to one Mahlon D. Thatcher, Trustee, and at that time a "mortgage clause" was attached to the policy, making the loss payable to the International Trust Company and its assigns, in words and figures hereinafter set out. The policy having expired on February 26th, 1893, a second policy for six months was issued, expiring August 26th, 1893. And complainant avers that under an agreement made with your petitioner a third renewal policy was agreed to be issued, and was in fact issued on August 26th, 1893, on the expiration of the second policy referred to, but that it was not delivered to the complainant as complainant alleges it should have been.

The complainant says that there was an agreement and contract made with Gordon, at the time the first policy of insurance was issued, for a continuous insurance upon the property, to continue until the hotel should be finished, and that a policy should have been issued on August 26th, 1893, in pursuance of this original agreement. The complainant also claimed that the mortgage clause attached to the policy on December 12th, 1892, was likewise a continuing contract with the complainant. And further

alleges that negotiations occurred beween the complainant and your petitioner on and after June 14th, 1893, and prior to August 26th, 1893, under and by virtue of which your petitioner agreed to issue, and did issue, but failed to deliver, a renewal policy for another term of six months; and says that complainant subsequently paid a premium for the alleged renewal policy.

Your petitioner, in its answer to the bill of complaint, denies that there was any agreement for a continuing insurance, or any agreement whatsoever for a renewal policy with the defendant society, and denies that there was any agreement whatsoever by and between complainant and your petitioner, or between your petitioner and Gordon at any time, relative to the issuing of a policy on the expiration of the second policy referred to, and says that no policy was issued, nor any agreement made for insurance, as claimed by the complainant, beyond the 26th of August, 1893; denies that any premium was paid to your petitioner by the complainant, as alleged, and says that there was no contract whatsoever on the part of your petitioner, either with Gordon or with the complainant, relative to insurance upon said property, save and except as was contained in and wholly set out and expressed in the two several policies expiring February 26th, 1893, and August 26th, 1893, respectively.

V.

Your petitioner further pleaded two special defenses, viz.: (1) That John R. Gordon sold and transferred the insured property, on the 3d of July, 1893, to The Mesa Hotel and Improvement Company,

without the knowledge or consent of your petitioner, and by virtue of such sale the said Gordon ceased thenceforth to have an insurable interest in the property and ceased to have "the fee simple title" thereto, and ceased to have "the sole and unconditional ownership" thereof as required by the conditions of the policy, and had no insurable interest therein on August 26th, 1893, or at the time of the fire.

And (2) that on December 29th, 1893, the Trust Company sold *without recourse* the Gordon note to The Investors' Mortgage Security Company, of Edinburgh, and on August 26th, 1893, the complainant Trust Company were not the owners of the Gordon note, and did not have the insurable interest therein sufficient to sustain the insurance under the terms and requirements as to interest and ownership of the subject of insurance prescribed by the policy of defendant society. So, that even if such policy was in fact issued, or agreed to be issued, no recovery could be had thereunder.

VI.

In the Circuit Court of Appeals the complainant below abandoned its contention and claims to a continuous contract, and rested its claims upon the alleged agreement that the policy of your petitioner would be renewed on the 26th of August, 1893.

VII.

Your petitioner contends that the Circuit Court of Appeals has not given to the conditions of the

insurance policy and mortgage clause the interpretation and construction which should be given thereto in the respects hereinafter set out; that the Circuit Court of Appeals erroneously found the facts in favor of the appellant; and formed erroneous conclusions therefrom, and erroneously declared the law applicable to the facts involved.

VIII.

The policy of insurance which the complainant complains should be delivered to it, and upon which the Circuit Court of Appeals based its decree, was what is known as the New York Standard form of fire insurance policy, and is the form of insurance policy now adopted and used in current underwriting by underwriters very generally throughout the United States, and adopted by statute in the States of New York, Pennsylvania, New Jersey, Michigan, Wisconsin, North Dakota and South Dakota. The Mortgage Clause was a modification of the New York Standard form of mortgage clause, also now adopted and used in current underwriting throughout the United States, and known also as a Union or Standard Mortgage Clause, and also adopted by statute in the State of New York, and in other states. The two papers combined constitute what is now termed in underwriting generally as *"a standard policy with mortgage clause attached."*

Among the provisions of the policy are the following: "This entire policy shall be void * * * if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circum-

stance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein." Also, "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise."

The mortgage clause was as follows:

Whereas, The property described in this policy has been conveyed to Mahlon D. Thatcher in trust, to secure the payment of a certain indebtedness to The International Trust Company, Denver, Colorado; and

Whereas, The owner of the policy has requested that the loss, if any, be made to the said Company: Therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns.

It Being Hereby Understood and Agreed, That this insurance, as to the interest of the mortgagee or Trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; Provided, That in case the Mortgagor or owner neglects or refuses to pay any premium due under this policy, then, on demand, the Mortgagee or Trustee shall pay the same; Provided, also, That the Mortgagee or Trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their

knowledge, and shall have permission for such change of ownership or increase of hazard duly endorsed on this policy; and, Provided, further, That every increase of hazard not permitted by the policy to the mortgagor or owner, shall be paid for by the Mortgagee or Trustee on reasonable demand, and after demand made by this company upon, and refusal by the mortgagor to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy as stipulated in the printed conditions of said policy; and, also, to cancel this agreement on giving ten days' notice of its intention to the Trustee or mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed, that in case of any other insurance upon the property hereby insured, then this company shall not be liable, under this policy, for a greater portion of any loss sustained, than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also agreed, that whenever this company shall pay the Mortgagee or Trustee any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor exists, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said company may, at its option, pay the said Mortgagee or Trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

In testimony that the foregoing provisions are made a part of Policy No. ....., of The Norwich Union Fire Insurance Society to which they are at-

tached, witness my hand at Pueblo, Colorado, this twenty-sixth day of August, A. D. 1893.

(Signed.) BENSON & KIRTLAND, Agents.

Accepted and agreed to by

THE INTERNATIONAL TRUST COMPANY.

(Signed by)

IX.

The firm of Benson & Kirtland, engaged in the business of fire insurance at Pueblo, represented at the times mentioned in the pleadings various insurance companies, and among them The Norwich Union Fire Insurance Society. Various companies doing business through Benson & Kirtland carried policies of insurance from time to time upon the hotel property in question, and your petitioner had a policy thereon for $10,000, which expired August 26th, 1893. This policy was issued to John R. Gordon, and had a mortgage clause attached as hereinbefore described.

X.

Benson & Kirtland had a clerk in their office by the name of Shepard, who was not employed or paid in any way by your petitioner. Among other things, it was the duty of this clerk to keep track of the expirations of all policies on record upon the books of Benson & Kirtland; and for the convenient dispatch of office business, to prepare, write out and fill up, from ten days to three weeks in advance of the dates of all expirations, new policies according to the forms

of the old, in order that the same might be ready for use in case such expiring risks should be renewed. In this way, and in pursuance of his ordinary routine work, the said clerk filled out one of the blank policies of the Norwich Union Society on or about the 8th day of August, 1893, in manner and form to correspond with the policy of defendant society on the said hotel property, which was to expire on August 26th, as aforesaid. The policy, with others, was countersigned by Kirtland on the same day and placed with other policies in a receptacle or drawer conveniently arranged by dates, to be used or not to be used, according to the determination or intention of the agents or the direction of the companies as to whether or not the risk in question should be taken for a new term.

Previously to this time work on the hotel building had been suspended, leaving it in an incomplete condition, and your petitioner having determined not to carry this risk again after the expiration of its then outstanding policy, had so instructed Benson & Kirtland, and the policy which had been filled out by the clerk was accordingly not issued or delivered, but, being spoiled for all purposes, was, in the due and ordinary course of business, returned to your petitioner by Benson & Kirtland as a spoiled policy. While the policy filled out by the clerk was noted by him upon the register of Benson & Kirtland in its regular order, it was never charged up against Gordon or the Trust Company, and no premium was charged therefor to either Gordon or to the Trust Company, or credited to the defendant society; nor was it the intention at any time of your petitioner or its agents to issue the said policy. Gordon was in-

formed that your petitioner would not write insurance upon the property after August 26th, 1893.

The spoiled policy was duly forwarded and filed as a voucher in the home office of your petitioner at Norwich, England, early in September, 1893, and was there when the fire occurred, on October 9th following.

On August 29th, 1893, the Secretary of the International Trust Company called at Benson & Kirtland's office, and the clerk, Shepard, upon referring to the register of policies, stated that a new policy had been written up, and, on being requested to send it to the Trust Company, said he would speak to Mr. Kirtland about it. No further notice was taken of this interview, however, by either party, and no request for, nor mention of the policy or renewal was again made by the Trust Company until September 26th, 1893, although in the meantime correspondence had passed between the Trust Company and Benson & Kirtland regarding the insurance in general upon the hotel, and on September 22d the managing officer of the Trust Company called at Benson & Kirtland's office regarding the hotel insurance, and then arranged about the payment of the premiums on the property for which Gordon had not paid, but made no reference to any insurance of the Norwich Union Society.

Upon September 26th the Trust Company wrote to Benson & Kirtland, inquiring about the renewal of the Norwich Union policy. At the same time the Trust Company wrote to Gordon at Pueblo in regard to the insurance on the hotel, and instructing him to call upon Benson & Kirtland and "check up and fix the insurance." Gordon accordingly called on Ben-

son & Kirtland on September 28th, and, being then and there fully aware that your petitioner had not renewed its insurance upon the property, at that time arranged with Benson & Kirtland that they should write your petitioner to ascertain whether or not your petitioner would again write insurance upon the property in case building operations should be resumed.

XI.

During several months preceding the thirteenth of September, 1893, John R. Gordon had become indebted to the firm of Benson & Kirtland in the sum of $282, chiefly on account of premiums for insurance upon said hotel property, but also for some other insurances which he had agreed to pay, but in which the Trust Company had no interest. Benson & Kirtland having repeatedly applied to Gordon for payment of this account, and he being unable to pay it, Gordon assumed and undertook on or about September 13th to obtain the money from the Trust Company, and Benson & Kirtland thereafter, on September 23d, at the instance and request of Gordon and of the Trust Company, made out and presented to the Trust Company their statement of the account of John R. Gordon for "balance due on insurance, $282." The Trust Company paid this under their letter of enclosure of September 26th, 1893, heretofore referred to. The Trust Company, on making this remittance, asked for an itemized bill showing what the insurance was for and the policies, and asked for an explanation as to the Norwich Union policy which expired on August 26th.

The money received from the Trust Company was applied by Benson & Kirtland in payment of the Gordon indebtedness as aforesaid.

It was practically admitted by Benson & Kirtland that an itemized account of the insurance was withheld from the Trust Company in order that the fact should not appear that insurance had been written at a "cut rate," and also for the purpose of concealing the fact that insurances were included in the bill in which the Trust Company had no interest. That this was done at the suggestion and request of John R. Gordon. Thereby the money was obtained from the Trust Company to pay the entire Gordon account, ostensibly for insurance on the hotel property, but being in reality in part for insurance on other property.

Prior to this time Benson & Kirtland had paid to your petitioner all the premiums upon policies issued by your petitioner on this property, and for the month of August your petitioner was indebted to Benson & Kirtland for a balance upon account of $6.90.

Your petitioner received no portion of the amount thus paid by the Trust Company, and received no benefit or advantage therefrom, and was and is entirely innocent of any fraud or deception practiced in regard thereto.

XII.

Upon the question whether your petitioner could be heard to say that it did not renew or extend the insurance on the property in question, which expired on August 26th, 1893, the Circuit Court of Ap-

peals, admitting that the testimony was in some respects conflicting, practically admitted that there was no contract for a renewal, but held in effect that your petitioner is estopped to allege that there was no contract, and based its decree on findings of fact as follows:

First—That on June 14th, 1893, the Vice President of the Trust Company received an assurance from the local agents of the defendant society at Pueblo that the policy then existing on the hotel property would be renewed on the 26th day of August, 1893, and that the insurance then existing would be continued in force for the Trust Company's benefit as long as the premiums were paid.

Second—The Secretary of the Trust Company, on August 29th, 1893, at the office of Benson & Kirtland, was informed by Wm. B. Shepard, the person in charge of the office, that the policy in defendant company which had expired on August 26th, 1893, had been renewed and that the interest of the Trust Company as mortgagee was thereby covered and protected. That a request on that occasion having been made by the secretary, Gibson, to forward the renewal policy to the Trust Company, at Denver, he (Gibson) left the office with the understanding that the renewal policy would be so forwarded.

Third—That prior to this interview of August 29th, a renewal policy had been made out and countersigned by the local agents of the defendant company and entered on the policy register.

Fourth—That Benson & Kirtland, for the purpose of collecting the account of John R. Gordon, be-

came privy to a scheme whereby money was to be obtained from the Trust Company, ostensibly to pay for insurance on the hotel property, but in reality to pay for insurance on property in which the Trust Company had no interest. That the Trust Company having been "doubtless deceived and misled to its prejudice by the representations made by the defendant's local agents that the risk upon the hotel property would be and had been renewed on August 26th, 1893, and by the concealment practiced in the respect last above stated" (namely, in the collection of the Gordon account and the appropriation of the moneys received to the payment of premiums for insurance on property in which the Trust Company had no interest), your petitioner "could not be heard to say that the policy in question was not renewed, whatever may have been its intention in that regard."

In this connection the Circuit Court of Appeals applied the following general proposition: "When the agents of an insurance company who are duly authorized to solicit and make contracts of insurance, deliberately represent to the assured that a given policy issued by the company has been renewed, and subsequently receive and appropriate money which they have good reason to believe is paid to cover the cost of such extended insurance, the company will be estopped to allege after a loss has occurred that the policy in question was not renewed."

XIII.

These findings of fact and conclusions of the Court thereon, your petitioner contends, are not supported by the evidence, and are in any event subject

to such material qualification and connection with other facts as would render inevitable a decree in favor of your petitioner.

In the interview referred to of June 14th, 1893, which was had by the Vice President of the Trust Company with the clerk, Shepard, it is admitted by the complainant's witness, the only witness in regard thereto, that no mention was made of a Norwich Union policy, and that nothing was said in regard to a renewal of that policy when the same should expire. The Court of Appeals itself admits in its opinion rendered, that what was said and done on that occasion would not bind the defendant society to issue a renewal policy.

It is an undisputed fact that the filling out of a policy in Kirtland's office was done by a clerk, Shepard, merely in the course of the routine clerical work of the office, there being present no determination or intention connected with the filling up of that policy in regard to its being issued.

The interview of August 29th was had by the Secretary of the Trust Company with the clerk, Shepard; and, at best, and particularly in view of the testimony given by Shepard of what was said and done at this interview, your petitioner believes it may be fairly stated from the evidence that the interview did not constitute an estoppel; that Shepard had not authority in any event to bind the defendant society, and that the Trust Company was not justified in resting upon this interview without prosecuting further its inquiries and negotiations relative to the renewal of the policy in question, nor did it rely upon this circumstance to its prejudice. It is admitted that Shepard did not promise that a policy would be sent to

the Trust Company, but said that he "would speak to Mr. Kirtland about it." The circumstances were sufficient to put the Trust Company upon inquiry as to the nature and extent of Shepard's authority. The policy was not sent, yet the Trust Company paid no more attention to the matter until September 26th, when it wrote the letter above mentioned, and at the same time sent Gordon in person to see Benson & Kirtland and to "check up and fix the insurance." Gordon, in pursuance of this instruction, and then knowing that the Norwich Union insurance had been dropped on expiration of the last policy, called upon Kirtland and arranged (September 28th) with him that he (Kirtland) should write to your petitioner to ascertain whether your petitioner would carry the risk again if building operations should be renewed. Kirtland did so write; but your petitioner declined to write again upon the property.

The collection of the $282 of Gordon's account, and whatever fraud or deception or collusion between Gordon and Kirtland was practiced, was a matter not done in the line of the agency of Benson & Kirtland, as agents of the defendant society, and was in no way to be accredited to your petitioner; your petitioner was neither privy to the scheme nor benefitted by it. The Trust Company cannot escape the fact that their own agent and representative, Gordon, was aware of and a party to this scheme. Under such circumstances an estoppel should not be held to exist against your petitioner to thus create a contract of insurance.

XIV.

As to the first special defense, the record shows that on July 3d, 1893, Gordon sold and conveyed all of his interest in the hotel property to the Mesa Hotel and Improvement Company, a corporation. This sale and conveyance was unknown to your petitioner until after the fire, and was also unknown to the Trust Company.

XV.

As to the second special defense, the facts are that on or about December 12th, 1892, the Trust Company loaned Gordon $50,000, for which he gave his note, payable June 12th, 1893. The note was secured by trust deed to Mahlon D. Thatcher upon the hotel property. On December 29th, 1892, the Trust Company sold the note, *without recourse*, to the Investors' Mortgage Security Company, of Edinburgh. On the note maturing the Investors' Company sent it to the Trust Company for collection. Gordon being unable at the time to pay either principal or interest, the Trust Company itself remitted the accrued interest, $1,750, to the Investors' Company, and Gordon paid it to the Trust Company the following week.

Commencing on May 26th, 1893, a correspondence ensued between the Trust Company and the Investors' Company, first regarding the collection of the Gordon note, and subsequently regarding the repurchase of the note by the Trust Company. This correspondence resulted in an understanding that the Trust Company should arrange to take over the note on September 15th following. The correspond-

ence continued until September 23d, a final agreement upon the terms of the proposed re-purchase not being arranged until September 5th.

This correspondence is in evidence, and constitutes the complete history and entire negotiations had relative to the transaction, save that about September 10th a representative of the Investors' Company visited Denver, and then arranged with the Trust Company about some collateral which the latter company desired to put up on the proposed re-purchase of the note.

When the loan was made, on December 12th, 1892, Gordon held a policy with your petitioner upon the property, which expired an February 26th, 1893, and at the request of Gordon, a mortgage clause was attached to that policy. On February 26th, 1893, a second policy was issued by your petitioner to Gordon, with a like mortgage clause attached. That policy expired on August 26th, 1893.

XVI.

The Circuit Court of Appeals held as to the special defenses: First, that the fact that Gordon, the assured under the policy theretofore carried by the Norwich Union Society, had, on July 3d, 1893, sold and parted with his interest and title to the property in question, and that he did not, on August 26th, 1893, or at any time thereafter, have any insurable interest in the property, would not affect the right of the Trust Company to recover the insurance by virtue of the mortgage clause, thus holding in effect that it is not necessary that the insured under the policy should have an insurable interest in the

property, either at the inception of the contract or at all thereafter in order to support the insurance or render it available to the payee under the mortgage clause.

Second, that the Trust Company, by virtue of an engagement to take over the Gordon note on the following September 15th, although the nature of its interest was undisclosed to the Norwich Union Society, had thereby acquired the insurable interest required under the terms and provisions of the insurance, and had, on August 26th, 1893, the insurable interest called for by the policy and necessary to support the insurance in its favor, independent of Gordon's interest, or of any other interest therein.

XVII.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said cause is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the act of Congress, entitled "An act to establish Circuit Courts of Appeals and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States and for other purposes," approved March 3d, 1891; the said case being made final in the said Circuit Court of Appeals by the said act, jurisdiction being acquired solely by virtue of the diverse citizenship of the parties.

XVIII.

The importance and gravity of the questions involved will be recognized when it is considered that an important principle of commercial (insurance) law is involved in the construction to be given to the mortgage clause and policy of insurance in settling the contractual rights of the several parties thereto and thereunder. The principle is involved not only in the case at bar, and is of importance not to your petitioner alone, but to underwriters in general. The question thus presented is whether the insurance can be supported by virtue of the collateral interest only of a payee under the mortgage clause when the party to whom the policy is issued has at and from the inception of the contract no interest in the property, and whether the mortgage clause is to be regarded as collateral to the policy itself, or whether it constitutes of itself a principal contract for insurance based directly and primarily upon the interest of the mortgagee or payee. It involves questions of insurable interest which are novel to this Court. The use of the so-called "mortgage clause" has become so widespread in current underwriting as to be involved in insurance transactions of great magnitude, aggregating, it may safely be said, many millions of dollars on properties diversely located within the jurisdiction of all of the various Federal Courts of the United States.

The form of contract involved and concerning which a construction is sought, has been sanctioned by legislative enactment, and its use made compulsory by statute, not only in the State of New

York, but in Pennsylvania, New Jersey, Michigan, North Dakota, South Dakota and Wisconsin, and has been adopted by insurance companies in general for use in the majority of the other states of the Union and in Canada.

The following statistics will indicate the extended use and importance of this form of contract: In the states named in which the policy is adopted by legislative act, the latest accessible statistics show a population of 16,992,000, or more than one-fourth that of the whole United States. The assessed valuation of real and personal property in those states is $9,043,143,000, or more than one-third of the entire assessed valuation of the United States. The amount of real estate mortgages in the states named amounted to $2,787,746,000, or nearly one-half of the mortgaged property of the United States, and the fire insurance written upon property in those states (in 1893) amounted to $5,023,951,000, or about one-half of the entire amount of fire insurance written in the United States.

The use in underwriting of the policy of fire insurance "with the mortgage clause attached" is a gradual development and evolution of a century of underwriting. The combination of these two instruments into one contract is an anomaly to the law of contracts, and is peculiar to the business of fire insurance. It is of necessary use in its present form to meet the exigencies and peculiarities of the business of fire insurance. It has a reason and foundation in principles of underwriting, the preservation of which are essential to the integrity of the business, and its significance and purpose and importance may be recognized and appreciated only by due

consideration of the history of underwriting as connected with the insurance of collateral interests. Insurances directly upon the interests of mortgagees and on other collateral interests are eschewed by underwriters, because they leave the door open to double insurances beyond the insurable value of properties, and thereby add to the moral hazard involved to a degree which renders that form of insurances particularly dangerous and impolitic.

The subject, therefore, is one deserving of grave consideration.

The widespread use of the policy and mortgage clause attached makes it of great importance that there should be a uniformity in the decisions of the various federal courts before whom these contracts are in recent years being brought with growing frequency. The only way in which that uniformity of decision can be secured is by a consideration of this peculiar contract in its various aspects by this Honorable Court and an authoritative declaration made as to the purpose, interpretation and construction of these contracts, which shall stand as a guide to all inferior tribunals. This Court has at no time had before it for consideration contracts of this kind, and has never announced an opinion in regard to the construction thereof.

Another important consideration which is presented in this case is the question of the nature and extent of the insurable interest acquired under an uncompleted agreement or negotiation for the purchase of collateral securities; and the extent to which an inchoate interest in a promissory note or chose in action, the nature of which interest is undisclosed and unknown to the insurer, will support an insurance

which requires that the interest of the insured thereunder shall be a sole and unconditional ownership.

A further question involved, of general importance, is that which relates to the making of an insurance contract by estoppel, it being held in effect by the Circuit Court of Appeals that the basis upon which the complainant is entitled to recover is that the acts of the clerk, Shepard, and the acts of Benson & Kirtland created an estoppel operative as against your petitioner, estopping it from declaring that it had not made a contract of renewal, when in fact no policy had been issued or delivered, and it is admitted by that Court that no contract for a renewal existed, nor had any advantage or benefit accrued to your petitioner, nor had the acts of any of the parties mentioned been authorized by or done with the knowledge or connivance of your petitioner, or in the line of the agency for your petitioner, and no evidence existed as to any contract having been made in its behalf other than in the acts complained of.

XIX.

The decision of the Circuit Court of Appeals presents an unwarranted and undue extension of the doctrine of estoppel to the creation of a contract. It goes further than any decision heretofore rendered "and lays down an impolitic rule which would make the business of insurance, transacted through agents all over the country far away from their principals, altogether too hazardous and uncertain," and which, if enforced, would lay your petitioner, as well as all other underwriters of the country, open to imposition and fraud, and lead to the fabrication of important

contracts of insurance by means of oral testimony and evidence which would surround the business with difficulties and dangers heretofore unknown, and against which it would be impossible for underwriters to protect themselves by their policies or by any known precaution.

It is, as stated above, practically admitted by the Circuit Court of Appeals that there was no contract for a renewal of the policy. The Trust Company itself abandoned the claim made in its complaint that there was an agreement for a continuing contract. So that the decision of the Court of Appeals rests upon the supposed effect of acts and declarations subsequent to the date at which the policy is claimed to have been issued, and the liability of your petitioner is made to rest wholly upon a supposed estoppel. The estoppel is held to have been created by two circumstances: 1. The statement of the clerk, Shepard, on August 29th, to the effect that a policy had been written up, or, as the witness for the Trust Company says, "renewed." 2. Collusive acts between Gordon and Kirtland subsequent thereto, whereby Gordon's account was collected from the Trust Company, the Trust Company having paid it without knowing how the money was to be applied and without first informing itself in that respect, and without any specific directions in that behalf, although under the impression that a portion of it should be applied to purchasing a policy of defendant society.

XX.

The decision of the Circuit Court of Appeals, holding that the rights of the Trust Company under

the mortgage clause are not affected by the fact that the assured under the policy had no interest in the property at the time the mortgage clause was attached, is based upon the decision of Syndicate Insurance Co. vs. Bohn (12th Circuit Court of Appeals, 531), which your petitioner is advised and respectfully submits is a grave misapprehension and an erroneous statement of the law and an erroneous interpretation of the contract in question, and is in conflict with the previous decisions of other courts of great respectability and authority. It is the only decision rendered and published of which your petitioner is aware in any Federal Court upon the question as to the effect which an absolute want of interest in the property on the part of the person insured at the inception of the contract will have upon the collateral rights of the mortagee or trustee under a mortgage clause.

XXI.

Your petitioner thus respectfully submits that the questions involved in and presented by the said case of your petitioner should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of the said questions on the part of your petitioner and of the complainant, the International Trust Company.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send

to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said Court of Appeals in the said case therein, entitled The International Trust Company, Appellant, vs. The Norwich Union Fire Insurance Society, Appellee, No. 662, to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the act of Congress, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3d, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem proper and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court. And your petitioner will ever pray, etc.

SYLVESTER G. WILLIAMS,
E. T. WELLS,
M. F. TAYLOR,

Solicitors and Counsel for Petitioner.

STATE OF COLORADO }
County of Arapahoe. } ss.

Sylvester G. Williams, being duly sworn, says that he is one of the solicitors for The Norwich Union Fire Insurance Society, the petitioner above named,

and as such has had personal charge for the said petitioner of the case in the foregoing petition mentioned in the Circuit Court of the United States for the District of Colorado, and in the United States Circuit Court of Appeals for the Eighth Circuit. That he has read the said petition by him subscribed, and that the facts therein stated are true, to the best of his information and belief.

SYLVESTER G. WILLIAMS.

Sworn to and subscribed before me this 25th day of January, 1896.

My commission expires July 5th, 1897.

ROBERT E. HALL,

(Seal.) Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

To Messrs. A. C. Campbell & A. E. Pattison,
Solicitors for the International Trust Company:

Please take notice that on the ~~2d~~ 10 day of March, 1896, at the opening of the Court, or as soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

SYLVESTER G. WILLIAMS,
WELLS, TAYLOR & TAYLOR,
Solicitors for Norwich Union Fire Insurance Society.

Service of and copy of the within notice, and also of the petition for writ of certiorari, received and acknowledged this 20 day of Feby, 1896.

A. E. PATTISON,
Solicitor for the International Trust Company.

MAR 9 1896
JAMES H. McKENNEY
CLERK

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

The International Trust Company, of the City of Denver, State of Colorado
Appellant.

vs.

The Norwich Union Fire Insurance Society,
Appellee.

No. 902.

BRIEF OF PETITIONER UPON PETITION OF THE NORWICH UNION FIRE INSURANCE SOCIETY FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SYLVESTER G. WILLIAMS,
EBENEZER T. WELLS,
MORTIMER F. TAYLOR,

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

The International Trust Company, of the City of Denver, State of Colorado
Appellant.

vs.

The Norwich Union Fire Insurance Society,
Appellee.

No. 902.

BRIEF OF PETITIONER UPON PETITION OF THE NORWICH UNION FIRE INSURANCE SOCIETY FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This petition for a writ of certiorari asks this Honorable Court to cause the Circuit Court of Ap-

peals for the Eighth Circuit to certify to this Court for its review and determination the above entitled cause.

The grounds upon which the petition is based are fully set out in the petition itself to which we refer for a more complete statement of the case.

It will be seen from the petition that the Court of Appeals reversed the decree of the Circuit Court, granted in favor of the petitioner.

It should be observed in general that under the Act of 1891, establishing Circuit Courts of Appeals, practically no question relating to the construction of insurance contracts, however important, can be brought for review before this Court save by proceeding in certiorari. The act referred to practically shuts out from the consideration of this Court all questions belonging to the domain of insurance law, unless they be entertained by this Court in the manner here requested. Thus, a particular attention would seem to be merited to cases of this class, belonging to a branch of commercial enterprise and activity so vast in its proportions and involving interests of so great magnitude.

The writ, if granted, would bring up for review the decisions, State and Federal, in conflict with the decision of the Court of Appeals in the case at bar, as to the questions here presented.

In this brief we desire to present for the consideration of this Court such a review of the questions involved and the authorities bearing thereon as shall enable this Court to determine whether the matters involved are of sufficient gravity and general importance, and present questions of such novelty

and difficulty as to merit the granting of the writ prayed for.

If the brief is more exhaustive than the practice demands for the purposes of the present proceeding, it will, we may assume, be none the less effective on that score for the purpose for which it is here presented.

This is a suit in equity; but although there are, accordingly, no findings of fact whatever to conclude this Court, we proceed to first consider those defenses interposed by the petitioner, appellee in the Court of Appeals, with respect to which the facts are very plain and wholly uncontroverted.

I.

The insured, Gordon, to whom, it is claimed, a policy of the petitioner should have been issued, had no interest in the property. The mortgage clause would not be an independent insurance of the International Trust Company.

And first as to the defense, that at the time, August 26th, 1893 (at which time it is alleged by the complainant that a policy should have been issued by the defendant society to John R. Gordon, with a mortgage clause thereto attached, making the loss payable to The International Trust Company), Gordon, unknown to the defendant society, had no interest whatever in the property, having parted with all interest therein by a conveyance on July 3d, 1893, to The Mesa Hotel and Improvement Company. Neither at the time it is alleged the policy should have been issued, nor at any time thereafter, did Gordon have any interest whatever in the property.

This case involves, accordingly, a determination and definition of the purpose, scope and legal effect of what is known and designated in current underwriting as "the mortgage clause." It is of much concern and manifest importance to underwriters generally, as well as to the insuring public, that it should be clearly determined whether or not this so-called mortgage clause is to be interpreted and treated as a species of collateral security, or whether it is to be regarded as an independent and direct insurance of the person named in the mortgage clause.

As indicated in the petition for this writ, the use of this mortgage clause in the business of fire insurance has become widespread, and the mortgage clause has come to be used in underwriting so extensively as would seem to render the questions thus presented of such gravity and importance as to warrant the consideration of this Court.

Not only are the questions presented of general interest, but they present an aspect of the fire insurance contract which is novel to this Court. An authoritative declaration, therefore, from this Court, of the legal effect of the mortgage clause attached to a policy of fire insurance will be of great utility and value in the business of fire underwriting, and tend to establish a uniformity in the decisions in reference thereto.

The appellee, the petitioner herein, contends on the one hand that the mortgage clause is a form of collateral security, which presupposes, in the first instance, and depends upon the interest in the property of the person named as the insured in the policy; that that interest affords the basis for the insurance; that notwithstanding the exemptions contained in the mortgage clause, the insurance is primarily that of the mortgagor or owner of the property, and as such is set over or assigned, as collateral security, to the designated mortgagee or trustee, or *cestui que trust*, as the case may be; that the "owner of the policy," at whose request by the language of this mortgage clause itself, the insurance is made payable in case of loss to the *cestui que trust*, is the person named in the policy as the assured (in this instance, John R. Gordon), and that all rights, primary and derivative, to the benefit of the insur-

ance flow in the first instance through him; that the mortgagor continues to be the insured and the owner of the policy, to whom the insurance will revert on payment of the mortgage debt; that whatever exemptions the mortgage clause contains favorable to the designated payee, relate to acts of the mortgagor which may be done *after* the attaching of the mortgage clause, and by which the insurance might thereafter become forfeited or invalidated; but that the provisions of the mortgage clause are not effective to validate an insurance which had no validity in its inception by reason of the fact that the person insured and designated as owner of the policy and of the property had, to start with, no interest whatever in the property.

The appellant contends, on the other hand, that the mortgage clause attached to the policy is designed to be an insurance directly upon the interest of the mortgagee, trustee, or *cestui que trust*, to whomsoever the insurance is made payable, and that it requires for its support no interest whatever in the assured named in the policy; and that the party named in the mortgage clause takes the insurance free from all equities which existed at and prior to the time the mortgage clause was attached. This latter view is adopted by the Court of Appeals, and we submit that it is a mistaken view and a misapprehension of the purpose, scope and legal effect of the instrument in question; that it is based upon scant and doubtful authority, while the better authority and reason of the case sustain the views of the appellee, the petitioner.

No question is presented here as to whether the interest of a mortgagee or trustee or of a *cestui que*

trust may not be made the subject of insurance. It goes without saying that such might be, if the insurer saw fit to insure any one of those interests, as such. But where the insurer has not seen fit to do that, a *cestui que trust* cannot, merely because of the nature of his interest in the property, claim the benefit of the insurance.

That a mortgagee, as such, has no right to insurance effected by the mortgagor, is well established by all the authorities.

As stated by this Court in Carpenter vs. Providence Washington Insurance Co., 16 Peters, 495, quoting from Columbian Insurance Co. vs. Lawrence, 10 Peters, 512: "We know of no principle of law or equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged premises in case of a loss by fire. It is not attached or an incident to his mortgage; it is strictly a personal contract for the benefit of the mortgagor to which the mortgagee has no more title than any other creditor."

No more can the *cestui que trust* claim, by virtue of his own collateral interest in the property, any contractual right as against the insurer under the insurance of the mortgagor. If the mortgagee is designated as payee under the policy, his right as an appointee to receive the insurance money emanates from the contractual rights of the mortgagor arising out of the contract of the latter with the insuring company. And it follows that whatever additional rights he may acquire by virtue of a mortgage clause are "tacked on" to the original contract between the mortgagor and insurer. They do not supplant or de-

stroy the original contract, but give to the payee additional rights and immunities with respect to that contract.

These rights under the mortgage clause are considerable. They afford an enlarged security; they go to amplify, favorably to the appointee, that portion of the clause which merely declares that the loss shall be payable to the appointee named. But the clause, with all of its provisions, still remains far enough removed from an absolute assignment of the policy, such as would go with the assignment of the property itself, and which, if consented to by the insurer, would constitute a new insurance immediately thenceforth upon the interest of the assignee.

We proceed accordingly to locate the mortgage clause as occupying a distinctly middle ground between a naked appointment of a designated person to receive the insurance fund in case of loss, and an absolute assignment of the insurance contract; partaking to some extent of the nature of both of these, it is nevertheless neither the one nor the other.

This leads to the consideration of the subject of the assignment of policies of fire insurance, a subject which has been extensively treated in the authorities. An assignment of a policy of insurance, as collateral security, simply by making the insurance payable to the mortgagee or trustee or *cestui que trust*, without any terms, conditions or exemptions, constitutes the payee named a mere appointee to receive the insurance money in case of loss; but the insurance remains subject to and forfeitable by any of the acts of the mortgagor which are forbidden by the terms of the insurance. This is so well established as to hardly need the citation of authorities.

Bates vs. Equitable Ins. Co., 10 Wall., 33.
Carpenter vs. Providence-Washington Ins. Co., 16 Pet., 495.
Fogg vs. Middlesex Ins. Co., 10 Cush., 337.
Grosvenor vs. Atlantic Ins. Co., 17 N. Y., 391, 394.
Continental Ins. Co. vs. Hulman, 92 Ill., 145.

An absolute assignment of the policy on the other hand, coupled with a transfer of the property and consented to by the insurer, is the complete divesting of the interest in the insurance of the party originally insured. It constitutes a complete novation and substitution of the parties.

But even in the case of an absolute assignment, many authorities hold that the assignment does not purge the contract from a forfeiture existing at the time the assignment is made. "That the assignee takes no new contract free of the *past*, but simply steps into the shoes of the assignor and for the future is substituted for him."

2 May on Insurance, section 378A, page 840.

Thus in Reid vs. Ins. Company, 54 Vermont, 413-16, the policy was originally issued to Robert A. Reid, who did not have a title in fee simple, unencumbered, to the property, contrary to the provisions of the policy. Subsequently the policy was assigned to the plaintiff and confirmed by the company. The right of the plaintiff to recover was resisted on the ground that Robert Reid did not have the title required. The Court, in defining the legal relations that subsisted between the plaintiff, as the assignee of said policy, and the defendant company,

said: "The plaintiff claims that by virtue of the approval of the assignment and confirmation of the policy to him, the defendant is estopped from denying its liability on account of anything that transpired between the insured and the insurer at the time the contract was entered into, or from setting up any act done by the insured after the policy was issued, *and before said assignment*, as a defense. The defendant claims that said approval and confirmation by it, in legal effect, was merely a substitution of the assignee for the party insured by the policy, and that the assignee only took the interest that his assignor had in the contract, subject to any defenses that might be made to it in the hands of the assignor.

"The policy was a chose in action, and all the interest that the assignor could convey by an assignment of it was the right to demand compensation from the defendant in case the property insured by the policy should be burned during its continuance, so that, independently of the approval of the assignment and confirmation of the policy to the plaintiff, the rules of law that determine and fix the rights of assignee and payor will be applicable here. By the approval of the assignment the company simply signified consent to its being made, and by the confirmation of the policy, agreed that it would accept and become liable to the assignee in place of the party to whom the policy was issued. By such approval and confirmation the defendant did not waive any right that it then had, or might thereafter have, to make any defense to any claim that might be made against it under the contract entered into with Robert A. Reid (assignor) and evidenced by the policy assigned. The approval and confirmation was not

evidence tending to show that the defendant entered into any new contract by which any new liability was incurred to the plaintiff. The approval of said assignment and the confirmation of the policy, then, being in legal effect the substitution of the assignee for the assignor, any defense existing at the time the assignment was approved and the policy confirmed that would have been available if suit had been brought in the name and for the benefit of the party to whom the policy was issued, is equally available against the assignee."

In the case of Eastman vs. Carroll County Mut. Fire Ins. Co., 45 Maine, 307, the policy was issued to one Ramsell. At the time the policy was issued Ramsell was not the owner of the property, but the title was in one Jameson. Subsequently Jameson conveyed the property to the plaintiff, and the policy of insurance was assigned to the plaintiff by Ramsell with the consent of the company. It was held that from the application made by Ramsell, and from the recitals in the assignment, the directors, at the time they consented to the transfer, had good reason to believe that the policy was then valid, and that by the written consent of the directors to the assignment of the policy in suit, the defendant company did not thereby ratify or confirm the assignment so as to make the policy which was conceded to have been originally void, a valid contract in the hands of the plaintiff.

In the case of Citizens' Fire Insurance Co. vs. Doll, 35 Md., 89, the firm to whom the policy was issued were not the owners of the property within the terms and requirements of the policy. The policy was subsequently, however, assigned to Doll, who at

the same time derived the ownership of the property from the real owner at the time the policy was obtained. The policy provided, as in the case at bar, "that if the interest of the assured in the property is not truly stated in the policy, or if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, it must be so represented to the assurers and so expressed in the written part of the policy or else the policy to be void."

It being admitted that the policy was void as to the original insured, the Court said: "This difficulty in the case, however, is sought to be obviated and removed, upon the theory that the assignment of the policy to the appellee with the assent of the appellant operated as, and constituted in fact and in law, a new contract between the parties to this cause, and that all antecedent causes for voiding the policy are excluded. But to this proposition we cannot assent as being applicable to a case like the present, if it can be applied to any case, in the sense and to the extent contended for by the appellee in this case. The risk contemplated by the policy never attached, because of the violation of the conditions which were fundamental to the contract; the policy was void in its very inception. The parties making the assignment had no interest at the time in the subject of the policy, and having no interest themselves, they could assign none. The policy, if void in their hands, was equally so in the hands of the assignee, who is one of the parties to whom the policy issued, and by whose misrepresentations it was rendered void from the beginning. The mere assent of the assurers to the assignment gave no force and vitality to the policy that

was before utterly void in the hands of the assignors. The policy was not assignable without such assent; the object of obtaining it was simply to authorize the transfer for what the policy was worth. By such assent the assurers only agreed to substitute the assignee in place of the assignors, but the causes that operated to render the policy void in its inception still adhered to it, and affected it in the hands of the assignee. He could occupy no better position than the assignors in reference to the policy unless it be by said contract with the assurers. It is true, as stated by writers of approved authority, that, "If the assignment, taken in connection with the policy, plainly transfers the assured's *whole interest*, the underwriter's assent is evidently equivalent to his agreement to be directly answerable to the assignee. In such case the proceedings to enforce payment may be in the assignee's name and be becomes to all intents and purposes the substituted party to the contract. But this, as is manifest, pre-supposes that the policy was at the time of assignment valid and operative; that the assured held such interest in the subject matter of the insurance as was assignable and sufficient to keep alive and subsisting the policy according to the terms and conditions upon which it was issued.

"This was far from being the case in this instance. The policy was simply void and the assent of the assurers to its assignment was neither intended nor operated to impart to it a validity and value that it never before had."

Citing,

State Mut. Fire Ins. Co. vs. Roberts, 31 Pennsylvania State, 438.

See, also,

Ellis vs. State Ins. Co., 68 Ia., 578.

The foregoing authorities thus hold that even an absolute assignment of the policy and confirmation thereof by the insurers, whatever may be the effect as to the future rights of the assignee, do not have the effect to validate a void policy. And we shall show hereafter that the rule is applicable with even greater force to the case of the mortgage clause, and that it has been so treated by the authorities.

As further preliminary, however, to a consideration of the mortgage clause, as such, and for a more complete understanding of the nature of that clause and the rights created by it, we proceed to consider the subject of the assignment of a policy for purposes of collateral security as it has been treated by the authorities.

The ordinary form in which the benefit of fire insurance was made available to mortgagees and creditors, prior to the introduction of the mortgage clause now in current use, was to endorse upon the policy the words "payable in case of loss to John Doe, mortgagee," or "loss, if any, payable to John Doe as his interest may appear," the policy being issued to and in the name of the owner of the property. This form of security received great attention from the courts, and the rights created thereby are very well defined in the authorities.

In the case of Bates vs. The Equitable Insurance Co., 10 Wallace, 33, the policy was issued originally to one Philbrick. Philbrick sold the property to Bates. The policy was endorsed as follows: "Payable in case of loss to E. C. Bates," and consent to

that endorsement was given in writing by the Secretary.

In passing upon the legal effect of the endorsement this Court said: "Now, it is a well-known and frequent thing in the insurance business for a person to insure his life or his property, and either in the policy itself or by endorsement at the time it is made, or by subsequent endorsement to which the consent of the company is generally required, to direct the loss to be paid to some third party, and this is done in language similar to if not identical with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor gives him this indemnity.

"In the face of this frequent use of the two endorsements on the policy, it cannot be held that they imply themselves a knowledge of the *sale*, or *a consent to insure the purchaser* * * *. We can see in these endorsements nothing more than the direction of Philbrick, and the consent of the company, that any loss sustained by Philbrick covered by that policy should be paid to Bates. As Philbrick did not have any interest in the goods when the fire occurred, he sustained no loss, and the policy covered none."

In Carpenter vs. Providence Washington Insurance Co., 16 Peters, 495, this Court again says:

"If, then, a mortgagor procures a policy on the property against fire and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity), as collateral security, that assignment operates wholly as an equitable transfer of the policy so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person without the consent of the underwriters, so as to divest all of his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy." And again, further on, the Court says: "It is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured, and his alone, that is designed to be covered; and when he parts with his title to the property, he can sustain no future loss or damage by fire; but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor. And as the grantee of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property or any interest therein."

And again, page —, the Court says: "An insur-

ance of a mortgagor and one of a mortgagee involve very different considerations, responsibilities, rights and duties, and the company might well be willing to make an insurance upon the property on account of the mortgagors, and they might be unwilling to make any on account of the mortgagee. And it is clear upon principle, that no policy can or ought to be deemed a policy exclusively on the interest of the mortgagee, unless the company have notice that it is so designed, and they assent to it. A mortgage interest is without doubt an insurable interest; but then it is a special interest, and should be made known to the underwriters."

And again, page —: "The language of Lord King and Lord Hardwicke, and of this Court in the cases already cited, show conclusively that policies of this sort are not in their nature incidents to the property insured, but that they are mere special agreements with the persons insuring, against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest as grantee or mortgagee or creditor or otherwise, may sustain by reason of a subsequent destruction thereof by fire."

In the case of Fogg vs. Middlesex Mutual Fire Insurance Co., 10 Cushing, 337 (Mass.), the Supreme Judicial Court of Massachusetts, by Shaw, C. J., speaking of the different modes of assignment and their effect, says, page —: "But there is another species of assignment or transfer, it may be called, in the nature of an assignment of a chose in action. It is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will be-

come due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor; but the original contract remains. The assignment and assent to it form *a new and derivative contract* out of the original. But the contract remains as a contract of guaranty to the original insured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest *prima facie* in the property burned, and does not recover as the party insured, but as the assignee of the party who has an insurable interest, and a right to recover, which right he has transferred to the assignee with the consent of the insurers."

In the case of Grosvenor vs. Atlantic Insurance Co., 17 New York, 391, in which the policy provided that in case of loss such loss should be payable to the plaintiff, the Court, in passing upon the legal effect of this provision, by Harris, J., said: "I agree with the Court below, that there is nothing in the language of the policy on which the Court can adjudge that in legal effect it is a contract insuring the interest of the mortgagee as such, except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest shall be payable to the mortgagee. That provision merely designates a person to whom such loss is to be paid, and shows that he is a person who may have an interest in its being so paid.

"The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the

principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurer * * * There is no just ground for discrimination between this case and that of an assignment of the policy to a mortgagee to be held by him as collateral security for his debt, with the consent of the insurer. In either case the insurance is upon the interest of the mortgagor, the terms and conditions upon which idemnity may be claimed are agreed upon, and then the original parties further agree that when by the terms and conditions of the contract the insurer shall become liable by reason of a loss sustained by the party insured, the money shall be paid, not to the party who has sustained the loss, but to his appointee or assignee for his benefit. Such an appointment or assignment ought not to be construed so as to vary in any respect the liabilities of the insurers upon their original contract."

In the case of Continental Insurance Co. vs. Hulman & Cox, a case in which the Honorable Chief Justice of this Court was counsel, the endorsement upon the policy was: "Loss, if any, payable to Messrs. Hulman & Cox, of Terre Haute, Indiana, Mortgagees, as interest may appear." And the Court, by Mr. Justice Sheldon, said, page 154: "Mak-

ing the loss, if any, payable to Hulman & Cox, Mortgagees, was not an insurance of their mortgage interest in the property. As said in Flanders on Fire Insurance, page 441: 'It is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence, it is the damage sustained by the party insured and not by the party appointed to receive payment that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and of course none is recoverable by his assignee or appointee. In other words, a policy made payable to A in case of loss is an agreement on the part of the insurers that A shall recover whatever the person originally insured may be entitled to recover in case of loss; that is, it is a contingent order or assignment of what may become due under the contract; and is not an absolute transfer by virtue of which the assignee acquires the full rights of an assignee of a chose in action.'"

Many other cases may be cited to the effect that a policy of insurance issued to a mortgagor of real astate, and made payable to the mortgagee in case of loss, is an insurance of the interest of the mortgagor in the estate and not of the interest of the mortgagee.

Baldwin vs. Phoenix Ins. Co., 60 N. H., 161
Macomber vs. Cambridge Mut. Fire Ins. Co., 8 Cush., Mass., 133.
State Ins. Co. vs. Maackens, 9 Vroom., N. J., page 564.

This being established and the nature of an absolute assignment being also understood, what is to

be said with regard to the construction of the mortgage clause, which contains in addition to the loss payable clause the exemptions and conditions therein set out?

The view of the petitioner, the appellee in this case, is that the mortgage clause is but a modification of the loss payable clause. While it is amplified in favor of the payee and provides certain exemptions from the acts or neglect of the mortgagor, the insurance, nevertheless, is predicated upon the interest of the mortgagor, the insured named in the policy. From this source, if at all, the insurance takes validity in the first instance. While, from and after the time at which the mortgage clause takes effect, the interest of the mortgagee or trustee or *cestui que trust*, as the case may be, is not to be affected by the acts or neglect of the insured, and while the mortgage clause does contain an agreement between the insurance company and the payee, *in addition to that contained in the policy itself*, the contract under the mortgage clause is made with respect to the interest of the payee in the insurance which has been effected upon the interest of the insured in the property, and is not an insurance upon the interest, as such, of the payee in the property. The mortgage clause, while it contains in one sense an independent agreement, is not an independent or new contract of insurance; it is by no means identical with a policy of insurance issued directly to the mortgagee upon the mortgagee's interest in the property.

Taken by itself the mortgage clause would be an unintelligible instrument; taken with the policy, and still an undertaking is presented anomalous to the general law of contracts. But it is not possible to

class such a contract with policies issued directly to a mortgagee, or with insurances upon the mortgagee's interest as such.

The case of Hastings vs. Westchester Ins. Co., 73 N. Y., 141, is the case relied upon by the Court of Appeals, and furnishes the supposed precedent for the case of Syndicate Ins. Co. vs. Bohn, (also decided by the Circuit Court of Appeals of this, the Eighth, Circuit), which in turn is the precedent taken for the case at bar.

The Hastings case is repeatedly referred to in the Bohn case as holding that by the contract relation created between the insurer and the payee under the mortgage clause, the mortgage agreement is a distinct and independent contract of insurance.

But in the case of Meriden Savings Bank vs. Home Mut. Ins. Co., 50 Conn., 396, the general nature of the agreement is differently stated. There was an agreement made between the bank and the insurance company, for a consideration, whereby it was provided in respect to policies of the defendant company which the bank might hold payable to it as collateral security, that no act of the owner under any policy should invalidate the insurance as to the bank.

The Court, referring to the Hastings case, says: "We do not, however, at this time and in this case, go quite so far as that seems to go, and hold that the mortgage agreement is a distinct and independent contract of insurance. It is rather an agreement relating to an existing policy by which certain conditions are dispensed with and certain privileges are secured to the insurers which they would not otherwise have, and the plaintiffs are made a party to the contract of insurance."

The case of Hastings vs. Westchester Insurance Company, affords substantially the whole foundation for the decision of the Circuit Court of Appeals in the case at bar, as will be found by reference to the case of Syndicate Ins. Co. vs. Bohn. The Bohn case it will be found, rests broadly and wholly upon the authority of the Hastings case, and holds that where the insured under the policy had no interest in the property at the time the insurance was effected, the right of a mortgagee to recover under the mortgage clause is not affected.

But the Hastings case upon the facts, is not in point. The facts and questions involved were very different from those in the case at bar. The only question in that case was whether the defendant was entitled to contribution from other insurance taken out by the insured, *with the consent of the defendant company*, prior to the attaching of the mortgage clause, but which other insurance was not payable to the plaintiff; and the point decided was that the defendant company was not entitled to contribution from the other existing insurance. The question was not in any way involved as to what effect a want of interest in the property on the part of the person insured under the policy would have upon the rights of the mortgagee under the mortgage clause, nor was there any question presented at all about the validity of the policy.

We submit that the Hastings case does not furnish a sufficient authority for the decision rendered by the Court of Appeals in the case at bar or in the Bohn case. A reference to the Hastings case will show not only that the point involved in the case at bar was not in issue in that case, but furthermore that that case was decided by a mere majority of a

divided Court, Judges Allen, Folger and Andrews dissenting.

But, again, we find in a much later case, decided by the New York Court of Appeals, *in which all of the judges concur*, it is held that a misrepresentation as to ownership at the time the policy is taken out is a complete defense to an action brought by the payee under the mortgage clause. The latter case is a complete refutation of the claim that the Hastings case was intended to apply to a case of this sort. We now refer to the case of Graham vs. Firemans Ins. Co., 87 N. Y., 69. A policy was issued running to the owner of the property, with the mortgage clause attached. In that case the Court held that if there is a breach of warranty or a misrepresentation as to the owner of the property, the special mortgage clause will not relieve the mortgagee from the effect of the breach of warranty, though it provides that as to the interest of the mortgagee the insurance shall not be invalidated by any act or neglect of the mortgagor or owner. It was represented that the owner of the property was the widow of a Captain Jack, whereas, she was in fact an infant daughter. The Court says that "The mortgage clause, exempting the mortgagee from the acts or neglect of the owner of the property, contemplates a case where the owner could act or neglect, and that a policy obtained through misrepresentation as to the owner cannot fairly be considered as embraced within the meaning of the clause referred to; nor can such misrepresentation be regarded of itself as an act or neglect within the terms of the policy."

So it would seem that in the case at bar, as

Gordon had no ownership or title at all to the property when it is claimed to have been issued—and this fact was not disclosed to the defendant insurance company—*the policy was void for breach of warranty of ownership;* nor can such breach of warranty, existing when the contract is made, be regarded as an act or neglect within the terms of the clause.

It will be noted, furthermore, that it is not an act or neglect of the owner of the property which is objected to in this case, or which affords the basis of this defense. The owner of the property was The Mesa Hotel and Improvement Company. The defense is, that John R. Gordon, the insured named in the policy, was not the owner at all; wherefore the policy could not have attached.

In the Graham case, counsel for appellant cited as authority, the case of Hastings vs. The Westchester Insurance Co.; but the Court of Appeals expressly stated that the authorities cited were not applicable to the question involved. The opinion, in both the Graham case and the Hastings case, was written by Judge Miller, and the Hastings case, we may accordingly assume, could not have been understood by that Court as intended to cover the question now under consideration.

In the case of Omnium Securities Company vs. Canada Fire and Marine Insurance Co., 1st Ontario, 497, we have an important case, and one directly in point. In that case it is held that the mortgage clause does not prevent the defendants from impeaching the policy as being obtained by fraud or misrepresentation; that it does not touch or affect the case of defects in the original contract of insurance, but points only to the future; that it does not

condone undiscovered fraud or warrant the policy to be conclusively binding at the time of this bargain. This case follows the Graham case, to which it refers with full approval.

The policy was effected by one McMahon. The mortgage clause attached provided, as in the case at bar, as follows: "It is hereby agreed that this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy."

The Court said:

"Without entering into that not very clear subject of 'subrogation,' we may treat it on the intelligible ground of a special bargain made, after McMahon had insured his premises, with his mortgagees, to whom he had made the loss payable. For a consideration sufficient in their estimation, the insurance company agree with the mortgagee that, so far as his mortgage interest is concerned, this insurance shall not be invalidated by any act or negligence of the mortgagor or owner of the property insured, nor by any different or more hazardous occupation than the policy allows.

"It seems to me that this provision only points to the future, and that insurers are not thereby debarred from setting up that the insurance had been effected by fraud. I think, so far as any knowledge on their part extended, they should be held to have elected to treat it as a valid, subsisting insurance at the time of this bargain with the mortgagees.

"In an ordinary case of loss payable to the

mortgagee, we can understand the latter agreeing with the insurers thus: 'If you will protect me from losing the benefit of this from any act this mortgagor may do as to change of occupancy, or, in fact, from any act or neglect of his, I will make over my mortgage to you if you pay me the loss.' And the insurers agree thereto. I do not think that they thereby guarantee to him that his mortgagor has committed no such fraud upon them in effecting the insurance. They do not warrant it to be an indisputable risk.

"I do not consider the subsequent provision in the clause, that whenever they pay any sum for the loss, and shall claim that as to the mortgagor or owner no liability existed therefor, they shall be to the extent of payment subrogated to all the rights of the party to whom payment shall be made and to all his securities, can affect the question. * * * I do not see how the insurers can be held to condone undiscovered fraud or warrant the policy to be conclusively binding at the time of this bargain, any more than that they should insist that the mortgagee warranted the validity of the mortgage as to the title, value, etc." * * * "I feel great difficulty in holding this clause to amount to a new insurance, to all intents and purposes, by and with the mortgagees. I understand how in some cases where the policy has been assigned with the insurers' assent, it may be so held as to future avoidance by the acts of the assignor. See Burton vs. Gore District Mutual Insurance Co., 12 Gr., 156, qualified by Livingstone vs. Western Assurance Co (in appeal), 16 Gr., 9.

"None of our cases seem to touch the case of

defects in the original contract of insurance, in consequence of subsequently discovered fraud.

"Suppose there was actually none of the property proposed for insurance in existence, and the company had been imposed upon by virtue of documents or lying representations, if plaintiff's contention be sound, the insurers could not be heard asserting the fraud. But it is said in such a case there would be no actual insurance, as there was nothing to insure. I fail to see an intelligible distinction between such a case."

The Court then refers to the case of Graham vs. Fireman's Insurance Co., supra, and says: "This case is very important. * * * A policy was issued to Catherine E. Jack, represented to be the widow of Captain Jack, who was going to keep a first-class hotel. The policy insured Catherine E. Jack, loss if any, payable to plaintiff as mortgagee. A second policy was applied for. Plaintiff's agent said there was a mistake in the name; that it should be Margaret, but that the policy was the same. The first policy was altered accordingly, and the second issued to Margaret E. Jack. It turned out that she had the title, but was an infant three years old, with no general guardian. There was a clause in the policy exactly in the words of the clause in this case, as quoted in the first page of this judgment. The case was very fully argued, and the policies were held void for misrepresentation as to the ownership, and after discussing this mortgage clause, which was urged as completely sheltering the plaintiff, the mortgagee, the Court said that: "A policy obtained through misrepresentation as to the owner cannot fairly be considered as embraced within the mean-

ing of the clause referred to, nor can such misrepresentation be regarded of itself as an act or neglect within the terms of the policy."

In the case of Doran vs. Franklin Fire Insurance Co., New York Court of Appeals, as reported in the 10th Ins. L. J., at page 843 (not fully reported in New York Reports), the Court, by Folger, C. J., speaking of the policy and mortgage clause, says: "The policy is an insurance of the owners and mortgagor's interest, loss if any, payable to the mortgagee. But there is an agreement by the insurer that if any act or omission of the owner takes place by which any condition of the policy is broken, and the policy voided by him, the insurer will not take advantage of that against the mortgagee; but will pay him the loss, reserving the right to the insurer that if it claims that there was such act or omission (which must mean that if it rightly so claims), it shall be subrogated to the rights of the mortgagee. *This is different from an insurance of the mortgage interest.* It is an insurance of the owner's interest, and the policy enures to his benefit at the outset, and so continues, unless some condition in it is broken."

In the case of Davis vs. German American Insurance Co., 135 Mass., 251, the Supreme Judicial Court of Massachusetts makes some valuable remarks upon the legal effect of the mortgage clause, attached to the policy under the following circumstances: The policy was issued to Putney, with the endorsement in the first instance "Payable, in case of loss, to Davis, Taylor & Demmon (the plaintiffs), to the extent of their interest." The policy had a provision against any change in title, sale or transfer of the property. Putney sold the property by ab-

solute conveyance. Subsequently the plaintiffs who held a mortgage upon the property foreclosed and took possession, and thereafter applied to the defendant insurance company and obtained the following endorsement upon the policy: "Boston, December 21st, 1878. Davis, Taylor & Demmon, the parties to whom this policy is payable in case of loss, being mortgagees, have entered for breach of the conditions of their said mortgage. It is understood and agreed that this policy shall attach and cover their interest as such. It is hereby agreed that this insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc."

Then follow the conditions of the mortgage clause whereby the mortgagees are to notify the company of any change of ownership, etc., and agree to pay for any increase of hazard and to subrogate the insurance company to the rights of the mortgagees under the securities in case of payment of loss. Under this contract, Davis et al. brought suit for loss. The Court held that the endorsement: "This policy shall attach and cover *their interests as such*," meant that "the promise previously made shall enure to the mortgagees' benefit in respect of the interest which they are supposed to have acquired by entry, as it previously attached *to the same interest in the hands of the mortgagor*." That the next provision of the mortgage clause, viz.: "'This insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor,' * * * evidently assumes that the undertaking to the mortgagees is still *only derivative* and *cut out of*

the insurance of the mortgagor's interest." "That the agreement for subrogation * * * proceeds on the same assumption." The Court says: "The conclusion which we thus draw from the construction of the endorsement, as to the notion upon which it is framed, is fortified by extrinsic facts. The defendant is a New York Company, and the endorsement is drawn in what seems to be an established New York form.

Hastings vs. Westchester Ins. Company, 73 N. Y., 141.

"The language of more than one New York decision would appear at first sight to countenance the view in question. 'After forfeiture and condition broken the mortgagee, if he be in possession, is considered as having the legal estate. * * * It is true that in Hastings vs. Westchester Insurance Company, a very similar clause was differently construed. But the first two sentences of the present endorsement were absent in that case. * * * We are confirmed in the opinion that the interest referred to was not the hitherto uninsured interest which the mortgagees had always had from before the date of the policy, alongside of the mortgagor's interest which the policy covered, but was the same or a part of the same interest previously insured and now supposed to be transferred *from the mortgagor* to the mortgagees."

"If this, and this alone, is the interest referred to, the plaintiff's case is at an end, because the breach of condition and entry had not the supposed effect, and because, further, the mortgagor had no interest

at the date of entry, she having alienated it before that time.

"If, however, the endorsement is to be construed more broadly than is quite consistent with its words, and is to be taken as promising to insure the mortgagee's interest generally, which had been outstanding but uninsured up to that date, it equally fails to give any rights to the plaintiffs because it is without consideration. In this view there is no analogy to the case of a transfer of premises and policy. When that takes place the same interest continues to be insured, and the substitution of parties in the policy can be reconciled with the doctrine of consideration in more ways than one. But the endorsement worked no substitution of parties. The mortgagor was not a party to the transaction. Whatever rights she had before, she retained after it, and is contemplated as retaining by its terms. The whole argument for the mortgagees must be that by Massachusetts law they already had such a contractual or quasi-contractual relation with the defendant under the policy, by reason of its being made payable to them in case of loss to the extent of their interest, that the discharge of it was a sufficient consideration for a new contract with different terms as in other cases of substituted contracts.

"But this argument is unsound. In the first place there is no substitution of contracts; the purport of the policy and endorsement taken together upon the construction of the latter which we are now assuming, is that the original promise to pay the mortgagees in case of loss *upon the mortgagor's interest* is kept on foot, and that there is added to it a

further promise to pay any loss upon the mortgagee's interest as well.

"In the first instance, even if it could be said with technical truth that the endorsement contained the whole and only promise to the mortgagees, and was substituted for that on the face of the policy, still we should read it as embracing the whole of the original promise, and adding the further undertaking just mentioned, to pay any loss on the mortgagee's interest in the property. Taking it this way then and assuming that the plaintiffs stand in as good a position as if they were the original insured, we think the objection would remain that no consideration is shown. For without disputing that one contract may be substituted for another even when the consideration is executed by way of accord and satisfaction, the form of such transaction cannot be made to cover what is in substance adding a new and gratuitous promise to an existing agreement upon executed consideration.

"In Hastings vs. Westchester Ins. Co., above referred to, where this clause was treated by a majority of the Court as being in substance a new policy issued to the mortgagees, it is suggested by one of the justices that a stipulation for subrogation in certain cases, upon payment, to the legal rights of the mortgagees under their securities to the extent of such payment, is the consideration. But apart from any objections to this view, it appears to us that this is a wholly subordinate provision attached to a *contract assumed to derive its validity from other sources.* And that it can no more be regarded as the conventional inducement of the defendant's undertaking by a fair construction of the instrument than the require-

ments that the mortgagees shall notify the company of any change of ownership, etc., can be. Of course, if we look outside the paper, we know that contracts of insurance are not in fact and do not purport to be founded on such casual incidents of performance on the insurer's part."

We quote thus extensively from the authorities to show that the view of the case at bar taken by the Court of Appeals, by which the contract in suit is held to be a direct insurance of The International Trust Company, it is a mistaken theory; that the only tenable and correct view is that the insurance is predicated upon the interest of John R. Gordon, the insured under the policy, as it was supposed and contemplated to exist at the inception of the contract; that the provisions of the mortgage clause providing that the insurance shall not be invalidated by any act or neglect of the mortgagor, etc., point only to the future, and do not "condone undiscovered fraud or warrant the policy to be conclusively binding at the time of this bargain."

The purport of the exemption in the mortgage clause of the trustee from the effects of a change of ownership of the property is simply that the contract, launched upon the Gordon interest, shall not be invalidated as to the Trustee in case the Gordon interest shall be transferred to another.

The proposition that the mortgage clause contains an independent contract with the party therein designated, need not be disputed; nor is that proposition inconsistent with the position here taken. It does not follow therefrom that the mortgage clause is an insurance of the payee thereunder or an insurance upon his interest in the property. The new and in-

dependent contract is an agreement made with respect to the already existing contract or policy of insurance. It does not agree that that existing policy is a valid one, nor does it substitute the payee for the insured, nor change the insurance from one upon the interest of the insured in the property to an original contract of insurance upon the interest of the payee.

The distinction between an interest in the insurance contract, which the payee acquires, and the interest in the property upon which the insurance is predicated must be manifest.

Smith vs. Saratoga Mut. Ins. Co., 3 Hill, 508.

The "interest of the trustee" contemplated by the mortgage clause has reference to his interest in the insurance, and not to his insurable interest in the property. This is clear not only on principle, but results as well from the express language of the mortgage clause. The clause reads: "This *insurance*, as to the interest of the mortgagee or trustee *therein* only, shall not be invalidated, etc."

The interest referred to, the right of the payee to receive payment of the insurance in case of loss, is an acquired or derivative right growing out of the contract with the original insured, and is not in itself an original contract of insurance.

Meriden Savings Bank vs. Home Mut. Ins. Co., 50 Conn., 396.

Davis vs. German-American Ins. Co., 135 Mass., 251.

Not only are we led to the conclusions thus reached from the authorities which have been pre-

sented, but we find that the mortgage clause occupies a distinct place in the history and development of the business of fire underwriting, and of the law governing the subject. That it is designed to meet a necessity of the business, for an understanding of which we are required to go back to the early history of insurance law. By so doing we find the practical reason by which to account for the existence of this peculiar form of contract.

A mere glance at this sort of a contract, which may be called an anomaly to the law of contracts, suggests immediately the question, why does such a contract exist for the purpose of securing the benefit of fire insurance to mortgagees or the holders of collateral securities, when it is manifest that an insurance directly to the mortgagee upon his interest as such would be a simple and valid undertaking? In response to that question we say that the principle of indemnity, the wholesome principle which lies at the foundation of fire underwriting, has rendered it inevitable that this form of contract should exist, and that fire underwriters should in general furnish insurance for the benefit of collateral interests, only in the form of a secondary or derivative contract, resting primarily upon the interest of the owner of the property.

Throughout the whole history of fire underwritnig it has been a perplexing problem to restrict the amount of insurance recoverable upon the property to the actual value of the property. Over-insurances and double insurances are the source of the greatest evils and dangers known to the business of fire underwriting. It is through these means that losses by fire may be readily made the subject of specula-

tion and gain and fraud. To restrict, therefore, by every possible means, the amount of the insurance carried upon property to the amount of its actual value has ever been the aim of underwriters, and in this they are sustained by a wise public policy.

Now, by an early decision of Lord Mansfield, the door was thrown open (unwittingly be it said, with respect to the memory of that learned man) to the perpetration of fraud by means of double insurances.

In the case of Godin et al. vs. London Assur. Corporation, 1 Burr, 493; 1 Bl. Rep., 103, Lord Mansfield decided that where different parties with different interests in the same property took out separate insurances, these insurances would not be contributory to each other, and each party might recover to the full value of the property within the limit of his insurance. This was a departure from the rules previously laid down, both in England and upon the Continent, whereby in the case of double insurances it was established that there should be but one satisfaction for the loss, to which the various underwriters in interest should contribute.

Under this decision of Lord Mansfield it became possible for any number of persons with different interests to insure property to its full value; as any lien might of itself exceed the whole value of the property, and thus many times the value of the property would be recovered in case of its destruction.

The decision of Lord Mansfield was followed in many cases, and is the law to-day. In fire insurance it came to be applied to cases involving the interests of mortgagor and mortgagee, and in many cases it has been held, and it is the law to-day, that insurance issued directly to a mortgagor and insurances issued

directly to a mortgagee or to any number of mortgagees, are neither contributory to each other, nor does the one invalidate the other under the provisions of policies forbidding the taking of other insurance.

Among the cases upon this subject are:

Tyler vs. Aetna Ins. Co., 12 Wendell, 507.
Fox vs. Phoenix Ins. Co., 52 Me., 333.
Mut. Safety Ins. Co. vs. Hone, 2d Coms., 235.
See 2 May on Ins., section 365.

This line of decisions, adding manifestly to the insurance risk by increasing the opportunities for double insurances, and hence the moral hazard of the insurance, led underwriters by a general consent, to practically cease to insure mortgagee interests as such. The "loss payable clause" was accordingly introduced into fire underwriting, and became the common form of collateral security; so that insurances ran to the mortgagor or owner of the property with the clause, "Loss, if any, payable to John Doe, mortgagee, as his interest may appear."

As we have heretofore shown, this loss payable clause received great attention from the Courts, and it has been uniformly held that the insurance thereunder is an insurance of the mortgagor upon his interest in the property, the mortgagee being thereby made merely an appointee to receive such sum as might otherwise become payable to the mortgagor.

The purpose of this clause and the practice under it will be readily understood to be the restricting of the insurance to a single insurable interest, and thus to limit the recovery in case of loss,

to a single indemnity, measured by the value of the property. When taken in connection with other clauses in the policy, such as that providing that the interest of the insured shall be the unconditional and sole ownership, it is designed that the amount of insurance recoverable shall be restricted to an amount equal to the value of the interest of an owner of the entire property, and that no more than once the value of that interest should be recovered.

But, pursuing the subject further, the fact that the Courts uniformly held that this form of insurance would not protect the mortgagee against the subsequent acts of the mortgagor, in violation of the terms of the policy, led to a demand on the part of the holders of collateral interests for a more liberal contract in their favor. To this demand the underwriters cautiously yielded. But the present mortgage clause did not spring at once, full fledged, into existence. It is apparently the result of successive additions to the ordinary loss payable clause.

Thus in the case of City Five Cents Savings Bank vs. Pennsylvania Fire Ins. Co., 122 Mass., 165, the loss being payable to the mortgagee, the policy contained the special provision merely, that "No sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss," and there are other cases of endorsement which do not contain all of the features of the Union Mortgage Clause.

But what is specially to be observed in this connection is, that while yielding to the demands of mortgagees for a more liberal form of endorsement, the underwriters did not abolish the loss payable clause, nor return to the plan of issuing insurances

directly to mortgagees upon their interests as such, as might have been done had the underwriters been willing to sacrifice the principles of indemnity or to assume the additional risks attendant upon the practice of separately insuring diverse interests in the same property.

Such being, in brief, the history of this form of agreement and the reason which underlies it, it can be readily seen why from the standpoint of practical underwriting the form of insurance now under consideration must be treated as primarily and essentially an insurance of the interest of the owner of the property and not an insurance of the interest of the mortgagee as such. Any other theory is subversive of fundamental principles of underwriting, and destructive entirely of the protection intended to be maintained against unlimited insurances upon limited values.

While the Court of Appeals in deciding the case goes on to set out in its statement of the case the defense thus raised and argued before that Court, it does not set out its conclusions; but in the case of Insurance Company vs. International Trust Company, a law case heard at the same term, the views of the Court are set out and the Court therein announces its adherence to the Bohn case. (See Ins. Co. North America vs. International Trust Co., now pending in this Court, No. 906, Transcript, page 175.)

II.

The Mortgage Clause in suit did not provide that the insurance, as to the interest of the Trust Company, should not be invalidated by acts of the mortgagor, or owner.

There is another reason why *The International Trust Company* cannot recover under this mortgage clause, by virtue merely of its interest in the securities. This reason grows out of peculiar provisions of the mortgage clause before us. A contract of this kind is a special bargain to be construed according to its terms and not to be enlarged by implication or extrinsic facts. In one important and remarkable aspect this mortgage clause differs from the ordinary standard mortgage clause, and from that found in the Bohn case. In the present instance, the form of security used is a trust deed and not a mortgage. The trustee under the trust deed is one Mahlon D. Thatcher. But the mortgage clause, instead of making the loss payable to Mahlon D. Thatcher, the Trustee, *makes it payable to The International Trust Company.*

Now, the recitals at the beginning of the mortgage clause go to distinguish it from similar clauses which have been before the Courts. The language used is as follows: "Whereas, The property described in this policy has been conveyed to Mahlon D. Thatcher, in trust, to secure the payment of a certain indebtedness to The International Trust Company, of Denver, Colorado;

"And whereas, The owner of the policy has requested that the loss, if any, be made payable *to the*

said company; therefore, the loss, if any, is made payable to The International Trust Company, Denver, Colorado, and its assigns." But the instrument then goes on in the ordinary language of the mortgage clause, and provides that "This insurance, as to the interest of the mortgagee, *or trustee, only,* therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." The clause does not make reference to the interest of the Trust Company, nor provide that the insurance shall not be invalidated as to the interest of The International Trust Company by the act of the mortgagor. So that, even assuming that the protection of the ordinary mortgage clause may be extended to apply to a case where the person insured has no interest in the property, it cannot be said that under the language of this clause The International Trust Company can avail itself of that protection.

If the interest *of the trustee only* in the insurance is not to be invalidated by acts of the owner of the property, then the interest of The International Trust Company is not included in the terms of this contract. Whatever the party who drew this instrument may have intended to accomplish, it is certain that it falls short of containing an exemption of The International Trust Company from the acts or neglect of Gordon. To make such a meaning evident, would require language which the parties have not used, and to enable the Court to give such a construction to the contract would require a reformation of the instrument, which is not called for in this action. If the Trust Company desired to secure enlarged and special benefits to itself, to be carved out of this insurance, it should have bargained for and secured a

contract in language adequate to express its desires and intentions in this behalf. If it has failed to do so, it is not the duty of the Court to make over the contract, or to reform the language used, particularly when no request has been made to that end. As the contract reads, it is in reality to be construed as to The International Trust Company as the ordinary loss payable clause has always been construed, and as if no provision of exemption in any event existed.

The two words, "mortgagee" and "trustee," used in this clause, are evidently incorporated into it, following the well known formula of the Union mortgage clause, which is printed and distributed by underwriters for use over a large territory, covering different States in which a variety of forms of real estate security are used—in some States mortgages, and in others trust deeds—the form being prepared with reference to use in a variety of cases, the one word, "mortgagee," or the other, "trustee," being superfluous according to whether a trust deed is used or a mortgage.

In case of a trust deed, it will be apparent that the interest of the *cestui que trust* and that of the trustee—in other words, in this case, the interest of The International Trust Company and that of Mahlon D. Thatcher, afford very different subjects matter for insurance.

In a case of this kind, where interests in property subject to trust deed are involved, there are three distinct insurable interests, upon any one of which, as a basic interest, the insurance might be predicated by a proper understanding and agreement of the parties and designation of the interest

to be covered. Very different legal and practical results would flow and different relations would be created between the several parties, according to the interest insured. Thus, the insurance could be written upon the interest of the owner of the property, or it could be written directly to the Trustee, or, again, directly to the *cestui que trust.* Again, it might be issued to the owner of the property with loss payable to the Trustee; or, with loss payable to the *cestui que trust.* The consequences of making the loss payable to the Trustee differ materially from those where it is made payable to the *cestui que trust,* the owner or holder of the note or notes which the trust deed is given to secure. Thus, if the loss be made payable to the Trustee, he holds the money, in case of loss, for all parties—both the owner of the property and the owner of the note—or notes, if there be more than one—whoever the owners of the notes may be, and whatever transfers may have been made of the securities.

If the owner of the property be not in default upon the note, the Trustee cannot pay over the funds in his hands to the owner of the note, but must hold the money as trustee for all parties and be accountable therefor to all.

Fergus vs. Wilmarth, 117 Ill., 542.

In case there should be no liability to the insured, the owner of the property, by reason of the breach of the policy conditions, it would seem that the Trustee would by virtue of the subrogation clause of the mortgage clause be trustee for the insurer and the owner of the note.

Frequently the payment of the insurance money

to a Trustee will be undesirable to the note holder, as for instance, in the case of a Public Trustee. The coming into possession of the insurance money immediately without the intervention of the Trustee, would be a desirable thing in many instances to the owner of the note, and it may be surmised that it was for such reason that The International Trust Company would desire the loss paid directly to it. But different legal consequences necessarily result in the two cases. And it cannot be contended that the Trust Company and Thatcher, the Trustee, occupy identical relations. The exemption of Thatcher, the Trustee, is not necessarily an exemption of the Trust Company from the acts of the party insured. The International Trust Company is not the Trustee under this contract, and the Trustee is alone declared to be exempt from the acts of the assured.

As to his interest in the property, the Trustee is the trustee of the legal title. Insurance, if it were made directly to him, would attach by virtue of his legal title to the property and his trust relations thereto. But where a particular owner of a note is designated as the payee, not in general terms, but by expressly naming the party, as in this case, The International Trust Company, the sale or transfer of the note, *without recourse*, terminates absolutely the interest of the payee in the insurance. And the insurance does not stand for the benefit of the endorsee of the note as it would in case the loss were payable to the Trustee. Thus it follows that as an insurance of the Trustee and an insurance of the *cestui que trust*, or particular owner of the note, are very different and distinct undertakings, a clause in the contract which

speaks of the interest of the Trustee only cannot be extended by implication merely, to the interest of the holder of the note.

In the Bohn case the loss was made payable to The National Life Insurance Company, beneficiaries and assigns, and the clause went on consistently with this direction throughout, to provide that as to the interest of the "mortgagee, beneficiaries and assignees," the insurance should not be invalidated, etc.

III.

The Trust Company itself did not have such an Insurable Interest in the securities as would support the insurance.

It is contended as above on behalf of the petitioner that the basis for the insurance contemplated in the alleged contract is the interest of John R. Gordon, as owner of the property, and that interest having no existence in fact, the alleged contract, had it been issued at all, would have been void for breach of warranty as to ownership.

But we proceed now to consider the case upon the theory adopted by the Court of Appeals, viz.: That the contract is one directly with The International Trust Company, and an immediate insurance of their interest as such in the property. Here comes in for consideration the second special defense presented by the appellee, viz.: That on December 29th, 1893, the Trust Company sold without recourse the Gordon note to The Investor's Mortgage Security Company, of Edinburgh, and that on August 26th, 1893, the complainant Trust Company was not the owner of the Gordon note; that it did not have the insurable interest therein sufficient to sustain the insurance under the terms and requirements prescribed by the policy of defendant society as to interest and ownership of the subject of insurance. So that, even if such policy was in fact issued or agreed to be issued, no recovery could be had thereunder.

The appellant, the complainant below, claims that at the time the policy was to have been issued, the International Trust Company was the absolute

owner of the Gordon note by a repurchase made on the 12th day of June, 1893, and as such owner had the insurable interest required by the terms of the insurance contract at the time that contract is alleged to have been made, and that the insurance attached directly upon that interest. The Court of Appeals sustained this claim.

But the claim of the Trust Company to the ownership of the Gordon note is based wholly upon corpany and the Investor's Company relative to the collection and to the repurchase by the Trust Company of the note. That correspondence is read into the evidence in the case by the witness, Hobson, beginning on page 98 of the transcript and continuing through page 108.

It is contended on behalf of the petitioner that this correspondence resulted, at most, in an engagement on the part of the Trust Company to take over the securities on the 15th of September. The Court of Appeals interpreted this correspondence as constituting a repurchase of the note on the 12th of June. The correspondence must be examined to determine whether the contention of petitioner is correct as to the effect of that correspondence, and as to whether or not it consummated a purchase of this note prior to the 26th day of August, 1893.

This branch of the case involves a consideration of the purpose and effect of the mortgage clause in another aspect entirely from that presented in the foregoing discussion. If the contention of the appellant, the Trust Company, should be sustained to the effect that the mortgage clause constitutes a direct and original contract of insurance of the Trust Company upon its spe-

cific interest in the property, the further question is presented as to whether the interest which the Trust Company actually had in the Gordon indebtedness at the time it is claimed the insurance should have been issued, was such an interest as would support the contract of insurance upon which recovery is sought.

It is claimed by the petitioner that the Trust Company did not have such an interest. Herein are presented questions as to the meaning and effect of the mortgage clause which we submit are likewise of such importance and general interest as to merit an examination and review by this Court.

In directing the consideration of the Court to the correspondence referred to, upon which rests the claim of the Trust Company to the insurable interest on which their right to recover is based, it is proper to say, that in another case, that of The International Trust Company vs. The Insurance Company of North America, a law case tried before the same Court, subsequently to the trial of this case, there were letters introduced in evidence which were not introduced by the complainant company in the present case. The same witness introduced the letters in both cases and read them into his testimony. But on page 104 of this record he testifies that between the 15th day of June and the 21st day of July, nothing was done about the matter, and that the Trust Company held the note as agents for the Investor's Company; whereas in The Insurance Company of North America case, the witness introduced a cablegram of June 26th, 1893, from the Investor's Company, a letter of the same date from the Trust Company to the Investor's Company and a letter of

June 28th from the Investor's Company to the Trust Company. We deem it proper to refer to this inasmuch as the case of The Insurance Company of North America has been also brought to this Court by petition for writ of certiorari, and the difference in the evidence in the two cases in this respect could not otherwise be understood. The opinion of the Court of Appeals proceeds upon the assumption that the letters and cablegram of June 26th and 28th are in evidence in this case, that Court having apparently confounded the records in the two cases referred to.

We accordingly refer to the correspondence as shown by this record, pages 98 to 108, inclusive. And we respectfully submit that, under the terms and provisions of the insurance, The International Trust Company did not, on August 26th, 1893, have an insurable interest of the nature and extent required and necessary to support the insurance claimed by it to have existed in its favor. Herein is involved, as stated in our petition, the question of the nature and extent of the insurable interest acquired under an uncompleted agreement or negotiation for the purchase of collateral securities, and the extent to which an inchoate interest in a promissory note or chose in action, the nature of which interest is undisclosed and unknown to the insurer, will support an insurance which requires that the interest of the insured shall be a sole and unconditional ownership. These questions involve the consideration of the contractual relations created by the policy of insurance with mortgage clause attached, and are of importance not in this case alone, but in all cases involving the construction of contracts of this kind.

In regard to the ownership of the Gordon note and its repurchase by the Trust Company, the Court of Appeals says in its opinion: "Now, while it may be true that the legal title to the paper was not vested in the Trust Company on June 26th, 1893, or even on August 26th, 1893, in the sense of the law merchant or in such way as to cut off equities of defense, because it had not been endorsed by the Mortgage Company, nevertheless, as *the agreement of sale was complete* and *the note was in the hands of the Trust Company*, there can be no doubt that the Trust Compauy had a good equitable title to the paper on August 26th, 1893, such a title as would have enabled the Trust Company to maintain an action at law on the note in the Courts of Colorado, whose code provides that 'every action shall be prescribed in the name of the real party in interest.'"

Code of Procedure, chapter 1, section 3.

"A consummated agreement of sale such as is shown by the correspondence in the present case, especially where the thing sold *is in the possession of the vendee*, operates to transfer the title of the article or thing sold to the purchaser. Under these circumstances we have no doubt that the Trust Company had *an insurable interest* in the hotel property in controversy on August 26th, 1893, and the contention to the contrary is in our opinion without merit."

Now, it will be observed that the Court of Appeals proceeds upon an assumption: First, that the agreement of sale was complete; and second, that the note was in the hands of the Trust Company or "in the possession of the vendee;" and third, that "*an insurable interest* in the hotel property" was all

that was necessary to support the insurance in question. But in the first place it will be disclosed by the correspondence itself between the Trust Company and the Investor's Company, that the terms of the sale were not agreed upon until September 5th, 1893. (See letter of International Trust Company to Guild & Shepherd of that date). Again, the note was *not* in the possession of the Trust Company, the note was endorsed by the Investor's Company to "John F. Bell, Trustee, for Investor's Mortgage Security Company, Limited." And as shown by letter of August 9th, 1893, it was sent by the Investor's Company to John F. Bell, so endorsed to him as Trustee, with the instruction, "Kindly acknowledge receipt of same and hold it for collection."

Finally, if it be admitted that under these circumstances the Trust Company had "an insurable interest in the hotel property in controversy on August 26th, 1893," it will be observed that the petitioner in this case has not undertaken to controvert or discuss the proposition as to whether an insurable interest existed, as it has been deemed unnecessary to do so in view of the fact that *an insurable interest*, merely, would not, in any event, have been sufficient to sustain an insurance such as that claimed to have existed in this case. It was necessary, in order to support such a contract of insurance, not only that the party insured should have had "an insurable interest," but that the interest of the kind and extent expressly called for by the terms of the contract should have existed.

Upon this correspondence the question is raised as to whether in contemplation of law The International Trust Company was the owner of the Gordon

note on the 26th of August, 1893, or, whether, by virtue of this correspondence, the Trust Company acquired the insurable interest necessary to support, under the terms of the contract, an insurance directly upon the interest of The International Trust Company. This, in turn, involves the more general consideration of importance in connection with the interpretation and construction of the mortgage clause generally, as to how far the terms and conditions of the policy itself enter into or control the mortgage clause, or to what extent the terms and conditions of these two instruments enter into each other and how the two instruments are to be construed when taken together in order to define the obligation assumed thereunder by the insurance company. What, in other words, are the terms and conditions of the insurance as between the underwriter and the payee, with respect to the various matters upon which the mortgage clause is silent, but with respect to which the policy itself speaks? If this is an insurance directly to the Trust Company upon its interest in the property, what are the terms and conditions of that insurance?

In considering the legal effect of the correspondence in question upon the ownership of the Gordon note, it becomes necessary to consider at the threshold the question which naturally and of necessity arises in the consideration of all such contracts, viz.: What constitutes the agreement between the insurer and the payee under the mortgage clause, as to the terms and conditions upon which the insurance is predicated; and how far are the terms and conditions set out in the policy to be taken as incorporated into the agreement with the payee under the mortgage clause; and how far do they go to determine and de-

fine the contractual rights of the parties, for example, as to the nature and extent of the insurable interest required of a payee?

Our position here is, that the terms of the policy must be referred to in order to determine the rights of the parties to the mortgage clause; so that, where the policy provides that if the interest of the insured in the property be not truly stated that the policy shall be void, and that it shall be void if the interest of the insured be other than unconditional and sole ownership, those conditions are to be applied and enforced with respect to any interest which is the subject of the insurance. In other words, the mortgage clause must be subject to the conditions of the policy with regard to the nature and extent of the insurable interest required to support the insurance.

In the case of American Building and Loan Association vs. Farmers' Insurance Company, 40 Pacific, 125-127, the Supreme Court of Washington says upon this subject: "The annexation of the mortgage clause operates merely as a modification of the policy by dispensing with certain requirements, duties and obligations which by the terms of the policy were imposed upon the owner, and protects the mortgagee against his (the mortgagor's) acts, either of omission or commission; but that general provisions of the policy intended for the security and protection of the company, and which do not relate personally to the mortgagor, such as the stipulation concerning the time in which an action shall be brought are not abrogated or affected by it. The mortgage clause is not a complete contract in itself, nor does it profess to be. It is of course conclusive upon the parties in so far as it speaks, and controls any provisions of the policy to which it is attached

which are inconsistent with it; but as a complete or entire contract it is indefinite and uncertain. Resort must still be had to the terms of the policy to ascertain many things which are the very life of the contract; among others, the amount of the insurance, the property insured, the term of insurance, and very many matters concerning which the endorsement itself furnishes absolutely no information whatever. The suit is based not upon the endorsement as a complete contract, but upon the policy of which it is simply a part. It is the policy which constitutes the basis of plaintiff's right to a recovery."

And so, in the case of Ormsby vs. Phoenix Insurance Co., Supreme Court of South Dakota, 24 Ins. L. J., 115, the court says: "But notwithstanding the mortgage clause constitutes a new agreement between defendant and mortgagee, there is, nevertheless, incorporated into it certain portions of the original contract of insurance with the owner or mortgagor. The property insured, the amount insured, the terms of the policy, the rate of insurance, must be determined by the original policy. In addition thereto the stipulations contained in the original policy may under certain circumstances be in force and effect."

In the case at bar, moreover, the mortgage clause expressly and formally declares that its "foregoing provisions are made a part of the policy * * * to which they are attached." And the policy also provides that its conditions shall apply to other interests than that of the insured, in the manner expressed in the provisions relating to such interest as may be attached to the policy. To determine, therefore, the nature and extent of the interest required to support a contract immediately with The Inter-

national Trust Company, it is necessary to resort to all of the terms of the insurance bearing upon that subject.

The interest upon which an insurance immediately to the plaintiff below would have to be predicated would be the interest of the plaintiff in the indebtedness, or its interest in the property by reason of, and measured by, its interest in the indebtedness; that is, in the Gordon note and securities.

Carpenter vs. Providence Wash. Ins. Co., 16 Peters, 495.

This would be, perhaps, not strictly an insurance of the debt, but an insurance of the plaintiff against any impairment of the value of the debt, by loss of the property which constitutes the security for the debt; so that the interest, if any, of the Trust Company in the debt or note, constitutes its insurable interest. The interest is described "as a certain indebtedness to The International Trust Company."

The mortgage clause in this case does not run as in some cases, "as interest may appear," but specifies the interest. We would submit, therefore, that the interest of the Trust Company, in order to support an insurance directly to it, must have been the sole and unconditional ownership of the Gordon note, or indebtedness, and that this interest must have existed at the time the insurance is alleged to have been taken out. The requirements as to interest constitute warranties as to the nature and extent of the interest insured.

By endorsing the note without recourse, The International Trust Company ceased to have any responsibility or liability as endorser, and therefore parted with all of its interest when it sold the note to The Investors' Security Company, December 29th,

1892. So that unless the correspondence between the Trust Company and the Investors' Company vested in the Trust Company the sole and unconditional ownership of the Gordon note on or before the 26th day of August, 1893, the insurance, even as an insurance directly upon the interest of the Trust Company, failed.

We think the appellant admits this, and accordingly insists that it was the absolute owner of the note.

In Carpenter vs. Providence Washington Insurance Company, 16 Peters, 495, this Court says:

"The authorities all hold that the party insured must have an interest at the time of the making of the policy as well as at the time of the loss; and if Reed had no interest upon which the policy would attach by its terms when the insurance was made, but acquired it afterwards, and the policy had been made upon his sole account, it would have been a mere nullity."

In Bergson vs. Builders' Insurance Company, 38 Cala., 543, the Court says: "The insured must have an interest in the property, both at the time the contract is made and when the loss happens; otherwise there can be no recovery on the policy; and upon this point all the authorities agree."

In Saddlers Company vs. Badcock, 2d Atkyns, (1st Bennett's Fire Insurance Cases, 7-9), the Court says: "I am of the opinion it is necessary that the party insured should have an interest or property at the time of the insuring and at the time the fire happens."

So, in Howard vs. Albany Insurance Company, 3d Denio, 301, the Court says: "When the assured has no interest at the time the contract is made the policy is a mere wager. * * * I agree that in

fire policies the assured must have an interest at the time of the loss, as well as when the contract is made."

To the same effect are the following authorities:

Phoenix Ins. Co. vs. Benton, 87 Ind., 132-133.
Fowler vs. New York Indemnity Ins. Co., 26 N. Y., 422.
Aurora Fire Ins. Co. vs. Johnson, 46 Ind., 315-322.
Chrisman vs. State Ins. Co., 16 Ore., 289.
Commercial Fire Ins. Co. vs. Capitol City Ins. Co., 81 Ala., 321.
Dickerman vs. Ins. Co. (Vermont), 30 Atlantic, 808.
Henning vs. Western Assur. Co., 77 Ia., 319.
Waller vs. Northern Assur. Co., 64 Ia., 101.

But it is not only necessary that the assured should have an insurable interest, but he must have the insurable interest which the contract calls for. In other words, he must, as in this case, have at the time of the making of the contract, the unconditional and sole ownership.

"It is not sufficient even that the party have an insurable interest in the property. He must have such an interest as the contract specifies."

Tallmann vs. Atlantic Ins. Co., 29 Howard's Practice, 71-86.

A consideration of what may in general constitute an insurable interest is not of importance, where the policy defines the extent of the interest necessary; as a mere insurable interest is not sufficient, if it falls short of the actual requirements of the policy.

Thus in Wineland vs. Security Ins. Co., 53 Md., 276, the Court says: "The question before is us not

whether the appellant had an insurable interest in the buildings insured, but whether by the terms of the contract into which he entered he had that kind of an interest, to-wit: title in fee to the land on which the houses stood, which the policy stipulates he shall have.

"Acceptance of the policy with condition as to absolute ownership amounts to a declaration that the interest is absolute."

Mers vs. Franklin Ins. Co., 68 Mo., 127.
Hinman vs. Hartford Fire. Ins. Co., 36 Wis., 159.
Fitchburg Savings Bank vs. Amazon Ins. Co., 125 Mass., 431.
Miller vs. Amazon Ins. Co., 46 Mich., 463.

"If the policy be once void it will not be revived by the fact that the assured subsequently acquires an interest."

Imperial Fire Ins. Co. vs. Coos County, U. S. Supreme Court, 1894, and cases there cited.
Carpenter vs. Providence-Washington Ins. Co., *supra*.
Cockerill vs. Cincinnati Mut. Ins. Co., 16 O., 148-165.
Peabody vs. Washington County Mut. Ins. Co., 20 Barb., 339-341.

The interest must be truly stated. Thus, where the insured was in possession of the property, having paid $2,680 of the purchase price, title to pass when balance of purchase price should have been paid. Held, that her interest was not truly stated, although it was true she had an insurable interest.

Lasher vs. St. Joseph, etc., Ins. Co., 86 N. Y., 423.
Ins. Co. vs. Bronger, 6 Bush. (Ky.) 146.

The Requisite Interest May be Measured by Other Considerations.

Thus the agreement in the mortgage clause for subrogation and assignment of the securities by the party to whom payment may be made, contemplates such an interest therein as would enable the Trust Company to make a complete assignment. This of itself would seem to involve of necessity the unconditional and sole ownership.

The subrogation clause is one which must be enforced. It is a material and important part of the contract to the terms of which the Courts give full effect.

Foster vs. Van Reed, 70 N. Y., 19.
Thornton vs. Enterprise Ins. Co., 71 Pa. State, 234-6.

By agreeing to make an assignment of the securities, the Trust Company warranted that it had the power to make such assignment.

Dick vs. Franklin Ins. Co., 10 Mo. Appeals, 376.
Affirmed in 81 Mo., 103-8.

But under the conditions existing on the 26th day of August, 1893, at which time the validity of the insurance is to be determined, the plaintiff could neither have assigned nor transferred the Gordon note, nor could it have compelled the Investor's Company to assign it. The inability of the Trust Company to make an assignment of the note at the time it claims to have made a contract of insurance with the appellee, shows the insufficiency of its insurable interest to meet the requirements of the agreement. If the Trust Company was the unconditional and sole

owner of the note, it could transfer it. The provision for subrogation clearly contemplates that the hands of the party to whom payment is contemplated should not be tied in such event.

Where a party agrees to transfer an interest in lands for a certain term of years, and at the time of agreement he has not that interest, there is no contract. The plaintiff must have an interest which will enable him to perform his contract.

Routledge vs. Grant, 4 Bing., 653.
1 Langdell's Cases, 5-10.

And if the party were unable to make such an assignment, his right to recover would be defeated.

Davis vs. Quincy Ins. Co., 10 Allen, 113-117.

If the mortgagee had entered into a contract inconsistent with the right to assign the mortgage debt as was provided, it would be a valid bar to any recovery upon the policy.

Foster vs Van Reed, *supra.*

Where a policy has an express provision for subrogation, the assured cannot recover if he has made a contract with a railroad company whereby his power to make a subrogation is annulled.

Inman vs. South Car. R. R. Co., 129 U. S., 128.
Carstairs vs. Mechanics' & Traders' Ins. Co., 18 Fed., 473.
Niagara Ins. Co. vs. Fidelity, etc., Co. (Pennsylvania S. C.), 18 Ins. L. J., 301.

Again, the interest in the debt must be free from the claims and interests of other parties. But, undoubtedly on the 26th of August, 1893, the actual ownership of the Gordon note was vested in the Investor's Company.

Two different parties, while they may have each an insurable interest, cannot have the same insurable interest at the same time in the same property. The relative interests of the Trust Company and the Investor's Company in this note at that time, and the fact that the Investor's Company were the real owners of the Gordon note, will come to light if we suppose the loss to have been made payable to Mahlon D. Thatcher, Trustee, under the policy, and that both the Trust Company and the Investor's Company had made claim to the benefit of the insurance. And supposing that one or the other, or both, were at the time insolvent, it would seem evident that the proceeds of any insurance money which might be paid to the Trustee, would belong to the creditors of the Investor's Company, and not of the Trust Company.

The general significance of the question thus presented will be appreciated when such a predicament is contemplated.

If now, the Investor's Company was possessed of the insurable interest requisite to support an insurance contract identical with that which is claimed by the Trust Company to exist in its favor, it follows that the Trust Company was not possessed of that requisite interest.

As a further test of the interest of the Investor's Company, it may be asked, in what way the Investors' Company was obligated to transfer the note to The International Trust Company? If not so obligated, the Trust Company had not acquired the right to say that these securities had been repurchased by it. Neither would the Trust Company be compelled to take over the securities under the then existing conditions. The consideration, if any, must

be one of mutual promises. If such do not exist, there is no contract.

Chicago & G. E. R. R. Co. vs. Dane, 43 N. Y., 241.

Neither party is bound unless both are bound.

Langdell's Summary of the Law of Contracts, Sec. 10.

Even a "moral obligation" to relieve the Investor's Company of the note would be no consideration for a promise to buy the note. The notion of a moral consideration has had no countenance since the case of Eastwood vs. Kenyon.

Langdell's Cases, 343 (Summary), pages 1025-6.

Letters and other writings upon the contents of which a contract is claimed to exist are construed by the Courts as matters of law.

Arnold vs. Bailey, 24 S. C., 494; 3 Am. and Eng. Enc. of Law, 867.

Dwight vs. Germania Life Ins. Co., 103 N. Y., 342.

Hamilton vs. L. & L. & G. Ins. Co., 136 U. S., 242.

Barton vs. Grey, 57 Mich., 623.

IV.

The decree of the Court of Appeals presents an undue extension of the doctrine of estoppel, creating a contract where none in fact existed.

The fourth question raised under our petition, in the order in which we have undertaken to present the case in this brief, relates to the holding by the Court of Appeals that the petitioner, the appellee, is estopped from saying that it did not issue and did not have any contract whatever of insurance upon this property. In other words, the holding is, that although the petitioner issued no policy of insurance, and had made no contract to do so, nevertheless, by reason of the subsequent acts and declarations of the clerk, Shepard, and of Kirtland, it is to be held as though a policy had been issued, whatever may have been the petitioner's intention in that regard.

It is claimed by the petitioner that the decision of the Circuit Court of Appeals presents an unwarranted and undue extension of the doctrine of estoppel, in its application to the creating of a contract where no contract in fact existed. It is impossible to fairly bring before this Court the errors of the Court of Appeals here complained of without a consideration and review to some extent of the evidence in the case.

Our treatment of this branch of the case will accordingly be restricted to so much only of the matters involved as may indicate to the Court wherein this branch of the case presents questions of general interest and importance, and to a summary of the points which the petitioner will aim to present upon a final hearing.

It is not to be understood that the petitioner

here contends that it is either a novel or important question for this Court to determine whether or not the Court of Appeals correctly found certain facts from the record. Taken alone, and as an abstract proposition, it may be admitted that it is neither novel or of general importance whether the Court of Appeals found certain facts erroneously in favor of the appellant, or not. But the inquiry which it is desired this Court should make in this connection is not limited to the question as to whether the Court of Appeals found the facts correctly or otherwise from the evidence; but the proposition which we would submit is, that the Court of Appeals, sitting as a Court of equity, erroneously declared and concluded, from the evidence adduced, that an estoppel existed, upon facts wholly insufficient in law and in equity to sustain such a finding.

This being a suit in equity, this Court will not be precluded at the proper time from making an examination of the record with a view to forming its own conclusions therefrom as to the facts disclosed, even though in forming its conclusions as to the legal effect of the evidence, it should be necessary to depart from some of the conclusions of fact at which the Court of Appeals arrived. This Court may, accordingly, in due course, examine the evidence contained in the record for the purpose of arriving at a conclusion for itself as to whether in law or in equity an estoppel is shown.

This Court may, accordingly, in due course, examine the evidence contained in the record for the purpose of arriving at a conclusion for itself as to whether in law or in equity an estoppel is shown.

The ground upon which we would submit this branch of the case for the review of this Court is, as stated in our petition, that the decision of the Court

of Appeals not only presents an unwarranted and undue extension of the doctrine of estoppel as applied to the creation of a contract; but it "lays down an impolitic rule which would make the business of insurance transacted through agents all over the country, far away from their principals, altogether too hazardous and uncertain," and establishes a precedent which, if followed, would lay not only the petitioner, but all other underwriters of the country open to imposition and fraud, and also gives unlimited sanction to the fabrication of important contracts of insurance, by means of oral testimony and by a kind and degree of evidence which, if accepted for such purposes, would surround the business of underwriting with difficulties and dangers heretofore unknown, and against which it would be impossible for underwriters to protect themselves by their policies or by any known precaution.

In showing to the Court the grounds upon which this contention is based, it will be necessary upon final presentation to review to some extent the evidence upon which the Appellate Court proceeded to make its findings. But we will undertake, moreover, to supplement our specifications of error in this behalf with such additional and material facts disclosed by the record as do not seem to have been considered, or otherwise have been disregarded, by the Court of Appeals.

If insurance companies are to be held to the performance of obligations which they never have in fact incurred, and for which they never have in fact received any consideration, and this by reason of an estoppel *in pais* through the acts of those who are employed by them as agents at a distance and under limited authority, it should only be upon evidence

which is very clear and positive, and the acts complained of to constitute the supposed estoppel should be clearly shown to be within the scope of the authority of the person against whom they are charged, and that they are done in the line of the agency and employment of that person.

It is an uncontroverted fact in this case that no policy of insurance was issued, either to Gordon or the Trust Company; that the defendant Society had no intention of issuing a policy; that the policy which was filled out in the office of Benson & Kirtland, was so filled out together with other policies, by a clerk in the office, as a part of his routine clerical work, in accordance with an office practice to write up from the records, new policies for all old policies about to expire; that the blank policy having been used for this purpose by the clerk, and remaining in the hands of the agent and being thus spoiled for other purposes or further use, was turned in in due course and long before the fire to the defendant society as a voucher for a spoiled policy; that no premium was charged upon it, against either Gordon or the Trust Company; that there was no intention at any time to issue such a policy; that the defendant society received no premium or consideration for a policy; that the spoiled policy was lying in the home office of the defendant society, at Norwich, England, as a voucher, when the fire occurred.

It would be out of place at this time to enter upon a discussion of the merits of the case, involving, as it does, an examination of the evidence. The petitioner desires at the proper time to submit to this Court, along with the questions presented in the preceding portions of this brief, such facts disclosed by the evidence as it is believed will man-

ifestly entitle the petitioner to an affirmance of the decree entered by the Circuit Court in favor of the petitioner, and which the Court of Appeals erroneously, we believe, set aside.

We believe it will be made manifest to this Court that the Court of Appeals erred not alone in its observations as to the evidence and in its conclusions of fact; but in its application of the law to the facts, and has, in its opinion rendered, overlooked and omitted to set out circumstances material to the merits of the case. We will undertake to show upon final presentation of the case, that the equities and the law are with the petitioner upon the question of estoppel, and that the petitioner should not be held estopped from asserting the fact in its behalf that it did not issue or make any agreement to issue a policy, as complainant has claimed. We purpose to show that the Trust Company did not receive an assurance that a policy would be issued. That the Court of Appeals has supplied a connection between the Insurance Society and the acts of Kirtland not warranted by the evidence; that the acts of Kirtland complained of were not done in his capacity as agent of the petitioner, nor in the line of his agency, but were for his personal benefit and account, and in his individual relations; that the petitioner had no interest in or connection with the collection by Kirtland of Gordon's account; that Kirtland's dealings with the Trust Company were in the main conducted through John R. Gordon, as authorized to represent the Trust Company, and himself the party in whose name the insurance is claimed to have been taken; that if the Trust Company was injured, it was quite as much or more through the dereliction of Gordon than of Kirtland; but at all events was an injury of

such a nature that the remedy, if any, would lie only against these men individually, and not against the petitioner.

We purpose to show that the Trust Company itself was derelict; that it did not follow up its inquiries, nor pursue its negotiations for insurance with reasonable diligence; that its failure to protect itself by insurance did not grow out of its reliance upon the belief that a policy of the petitioner had been issued, but out of its own neglect and indifference to the matter in hand. It will be shown from the record that as late as September 22d, 1893, the Manager of the Trust Company visited Kirtland's office to confer about the hotel insurance, yet made no reference to nor inquiry about any supposed insurance with the petitioner.

It will be shown from the record that contemporaneously with the letter of inquiry from the Trust Company to Kirtland, of September 26th, the Trust Company sent Gordon in person to Kirtland's office with instructions "to check up and fix this insurance;" that in pursuance of such instructions, Gordon did call and with knowledge of the situation then and there arranged with Kirtland that the latter should write to the defendant society to ask if the society would accept a risk upon the property in case building operations should be resumed. It will be shown from the record that the evidence as to the interview with the clerk, Shepard, in August, on which the Court of Appeals lays stress, was conflicting and did not fairly more than establish that Shepard, the clerk, knowing that such a policy had been written up by him in the course of his work, but not knowing what disposition had been or was to be made of it, informed Gibson of the facts so far as he

knew, and on request said that he would speak to Kirtland about the matter.

We submit as a proposition of general importance in connection with the business of underwriting and the law of insurance, that the application of theories of waiver and estoppel has come in the adjudications of various courts, as in this instance, indeed, to exceed reasonable bounds. The use of the doctrine of estoppel to create a contract is one which should be sparingly exercised and applied only in cases which are free from doubt. The interposition of equity to support claims of this sort is not justified, if the party alleging the misrepresentation "did not in fact trust in or was not misled by it, *or if it was vague or inconclusive in its nature*, or if it was upon a matter of opinion or fact equally open to the knowledge of both parties in regard to which neither could be presumed to trust the other; in these and like cases it is said that equity will not grant relief."

Bigelow on Estoppel, 3d Ed., 477.

The doctrine of estoppel by conduct is founded upon similar considerations. So far as any declaration involves a statement of opinion or of a legal conclusion, or if the statement could in any respect "be understood to be a conclusion of law from a comparison of facts, propositions or the like, the party may allege its incorrectness."

That fraud is the underlying element necessary to the existence of an estoppel by conduct, and it is in general fatal to the supposed estoppel claimed that the representation was made under a mistake."

Bigelow on Estoppel, page 519.

It is also well established that in order to the estoppel, there must have been knowledge, actual or constructive, by the party making the representa-

tion, that the other party intended at the time to act upon it. And the whole representation must be taken together.

"Certainty is essential to all estoppels. The Courts will not easily suffer a man to be deprived of his property or security where he had no intention to part with it."

Bigelow, 490.

It is laid down by the authorities "there can be no estoppel where the party claiming one is obliged, before changing his position, to inquire for the existence of other acts to make the inducement sufficient and to rely upon them also in acting."

Bigelow, 551.

And that "though the party may no doubt act upon any one of several representations or inducements from several sources, it will not answer for him to put together two severally insufficient inducements from different and independent sources.

Ibid., 551.

So the appellant could not put together the several independent circumstances relied upon and thus make up an estoppel, where neither circumstance is in itself sufficient to create an estoppel. This, nevertheless, seems to be what the Court of Appeals has permitted to be done.

Finally in this behalf we would submit that the Court of Appeals decided the issues in favor of the appellant upon evidence insufficient to support a decree in equity; that as a general proposition, in order to support such a decree, the evidence should be clear and positive in support of the appellant's claims, and in case of conflict or doubt, should be resolved in favor of the appellee.

That a Court of Equity, sitting in judgment upon evidence of this sort, is bound in conscience and in law to throw its weight on the side of the defendant, and not to find for the plaintiff unless the evidence is clear and preponderating. The degree of evidence sufficient to support the judgment of the Court of Appeals we believe to be wanting, and that that Court has gone further than any known case, in declaring that under the circumstances of this case a valid contract of insurance existed.

Respectfully submitted,

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EBENEZER T. WELLS,
MORTIMER F. TAYLOR,

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1895.

THE INTERNATIONAL TRUST COMPANY, *Appellant*,

vs.

THE NORWICH UNION FIRE INSURANCE SOCIETY, *Appellee*.

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ARGUMENT ON BEHALF OF THE INTERNATIONAL TRUST COMPANY, OPPOSING THE ISSUE OF A WRIT OF CERTIORARI.

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I.

This Court has repeatedly held that it will not grant the prayer for a writ of certiorari unless the questions involved are grave and important in their nature, or unless it appears that there is not uniformity of decision in the different Courts of Appeal rela-

tive to one or more of the questions sought to be reviewed.

In re Lau Ow Bew, 141 U. S., 583.
In re Lau Ow Bew, 144 U. S., 47.
In re Woods, 143 U. S., 202.
American Const. Co. vs. Jacksonville & K. W. Ry. Co., 148 U. S., 372.

The petition does not suggest that there is any diversity of opinion among the different Courts of Appeal relative to the questions passed upon and decided in this case by the learned Circuit Court of Appeals for the Eighth Circuit, but expresses a fear that in the future some other Court of Appeals might view the questions passed upon in a different light, provided similar questions were presented. As uniformity of decision does not require the interposition of this Court, the petition must show that the questions involved are grave and important.

Do the questions presented by this record fall within the term "grave and important," as it is used by this Court? These questions are:

1. Did The International Trust Company have an insurable interest in the property destroyed on August 26th, 1893, and until October 9th, 1893, the date of the fire?

2. Did the agents of the Insurance Company, by their words, conduct and actions induce the Trust Company to believe that the policy of insurance sued upon and for had been issued on August 26th, 1893, and from said date was in force and effect?

3. Did the agents of the Insurance Company collect from the Trust Company the premium due upon the policy?

4. Can there be a valid policy of insurance

without manual delivery of the same to the assured?

5. Does the attaching of a mortgage clause to a policy of insurance, such as was used in this case, have the effect of a separate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the mortgagee, unaffected by any act or neglect of the mortgagor of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause?

We respectfully submit that none of these questions fall within the term "grave and important," as heretofore used by this Court. The law which the learned Court of Appeals for the Eighth Circuit applied to the facts, as found from the evidence, is upheld and supported by a long line of decisions, both State and Federal, rendered during the last twenty years.

II.

We will, however, note briefly the several points suggested. The first is, that the construction which the learned Court of Appeals placed upon the mortgage clause attached to the policy is a grave misapprehension of the law.

The learned Court of Apeals, in deciding this case, followed the doctrine laid down by it in the case of Insurance Co. vs. Bohn, 12 Circuit Court of App., 531; 65 Federal R., 165, as to the effect of the mortgage clause atached to the policy of insurance. A construction similar to this was placed upon the same sort of mortgage clause by the Court of Appeals of the State of New York as early as 1878, in

the case of Hastings vs. Ins. Co., 73 N. Y., 141. The doctrine laid down by the Court of Appeals in the case above referred to has been sanctioned and upheld by every Court, both State and Federal, since that time.

Ins. Co. vs. Stanton, 57 Ill., 354.
Fogg vs. Mutual Fire Ins. Co., 10 Cush, 345.
Francis vs. Ins. Co., 7 R. I., 159.
Boynton vs. Clinton, 16 Barb., 254.
Foster vs. Equitable M. F. Ins. Co., 2 Gray, 216.
Ormsby vs. Ins. Co., 58 N. W., 301, 302.
Phoenix Ins. Co. vs. Omaha L. & T. Co., 60 N. W., 133.
May on Insurance, Vol. I., Sec. 276.

It will be here noted that while the decision in this case is but a reiteration of the principle laid down in the case of Syndicate Ins. Co. vs. Bohn, it did not occur to counsel for the Syndicate Insurance Company, after their petition for rehearing was denied by the learned Circuit Court of Appeals, that the question involved in that decision was of such gravity and importance as would justify this Court in reviewing the decision in that case, as no application was presented here for a writ of certiorari.

The second point urged is, that the agreement to repurchase the Gordon note was not completed on the day the policy was issued and the mortgage clause attached to the policy. This was one of the points insistently urged before the trial Court and also in the Circuit Court of Appeals on an appeal from the decision of the trial Court. The question was largely, if not wholly, of fact, and the Circuit Court of Appeals has found as a fact that on

the 26th day of August, 1893, the Trust Company had so far completed its agreement and negotiations with the Scottish Investment Company for the repurchase of the Gordon note as to give the Trust Company an insurable interest in the property covered by the trust deed, which was given to secure the Gordon note. On this point the learned Court of Appeals used the following language:

"Another defense that is urged in this Court, although it was overruled by the Circuit Court, is, in substance, that the Trust Company had no insurable interest in the hotel property in question on August 26th, 1893, even if it was true that the policy in controversy was on that day renewed or extended. This claim is based on the assumption that the Trust Company did not re-acquire the Gordon note and the deed of trust from The Investor's Mortgage Security Company until some time after August 26th, 1893. The facts pertaining to this defense, as we find them, are these: Pending the negotiations between Gordon and the Trust Company to obtain a renewal of the loan, and after it became apparent that Gordon would not be able to meet his obligation, the Trust Company, by a letter written on June 13th, 1893, proposed to the Mortgage Company to repurchase the note and deed of trust which it had previously sold. The proposition as made required the Trust Company to advance the money to take up the note within sixty days, or prior to August 12th, 1893, the note being then in the hands of the Trust Company and held by it for collection. At the same time the Trust Company advanced and paid to the Mortgage Company the accrued interest on the note, to-wit, $1,750. By a telegram and letter dated respectively on June 26th and 28th, 1893, acknowledging receipt of the Trust Company's proposition, the Mortgage Company accepted the proposition to sell the note, but gave the Trust Company more time than it asked, that is, until September 15th, 1893, to pay for the note. This latter proposition of the Mortgage Company was accepted by the

Trust Company immediately on the receipt of the Mortgage Company's telegram, by a letter written to the Mortgage Company on June 26th, 1893, and the agreement to purchase the note thus became complete. Now, while it may be true that the legal title to the paper was not vested in the Trust Company on June 26th, 1893, or even on August 26th, 1893, in the sense of the law merchant, or in such way as to cut off equities of defense, because it had not been indorsed by the Mortgage Company, nevertheless, as the agreement of sale was complete and the note was in the hands of the Trust Company, there can be no doubt that the Trust Company had a good equitable title to the paper on August 26th, 1893, such a title, in fact, as would have enabled the Trust Company to maintain an action at law on the note in the Courts of Colorado, whose code provides that "every action shall be prosecuted in the name of the real party in interest." (Colo. Code of Procedure, chapter 1, section 3.) A consummated agreement of sale, such as is shown by the correspondence in the present case, especially where the thing sold is in the possession of the vendee, operates to transfer the title of the article or thing sold to the purchaser. Under these circumstances we have no doubt that the Trust Company had an insurable interest in the hotel property in controversy on August 26th, 1893, and the contention to the contrary is, in our opinion, without merit."

The third point urged is, that the learned Court of Appeals erred in its application of the doctrine of estoppel to the facts as found. The facts as found by the learned Court of Appeals, as gathered from the opinion rendered in this case, are:

First—That on the 14th of June, 1893, the agents of the Insurance Company gave assurance to the Trust Company that the policy of Insurance then in force and which would expire on August 26th, 1893, would be renewed upon the same terms and conditions.

Second—That on the 29th of August, 1893, three days after the expiration of the old policy, the agents of the Insurance Company, on inquiry being made therefor by the Trust Company, asured the Trust Company that the policy had been renewed on the 26th of August, 1893, and that the same was in force and effect.

Third—That subsequent to the 29th of August, 1893, and prior to the date of the fire, demand was made by the agents of the Insurance Company upon the Trust Company for the premium due upon the policy in suit, and that said premium was paid by the Trust Company.

The evidence in the case fully justifies these conclusions as found by the learned Circuit Court of Appeals, and we confidently submit that under the well known rules defining the doctrine of estoppel, the Court did not misapprehend the law in deciding that the Insurance Company was estopped from denying that the policy had been issued and was in force.

The rule of estoppel between parties covers, of course, the misrepresentations of agents, even agents of corporations when made in the scope of their employment. Where an agency really exists the principal is estopped to deny the truth of the agent's statements, express or tacit, just as much as if he had himself made them, subject to the same limitations that would prevail in that case.

Bigelow on Estoppel (5th Ed.), page 598.

An estoppel in pais may be defined as an express or implied admission, become indisputable by reason of the circumstances that the party claiming the benefit of it has, while acting in good faith and

in accordance with the real or presumed assent of the other party, been induced by it to change his position.

Bigelow on Estoppel (5th Ed.), 453, note.

To constitute an estoppel the other party must be shown to be liable to injury and damage by reason of the conduct of the party against whom the estoppel is made.

Guest vs. Burlington Opera House, 38 N. W., 158.

"Whenever an act is done or a statement made by a party, which cannot be contradicted without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere matter of evidence."

Insurance Co. vs. Slee, 12 N. E., 547.

"Where a duty is cast upon a person by the usages of business or otherwise, to disclose the truth (which he has the means, y ordinary diligence, of ascertaining) and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent."

Leathers Mfrs. Nat. Bank vs. Morgan, 117 U. S., 96; 29 Law Ed., 811, 817.

See, also,

Weisser vs. Dennison, 10 N. Y., 75.

Parliman vs. Young, 4 N. W., 144.

O'Mulcahey vs. Knapp, 8 N. W., 906.

Plumb vs. Ins. Co., 18 N. Y., 392.

Brown vs. Bowen, 30 N. Y., 519.
Jamison vs. Miller, 20 N. W., 491.

Estoppel implies that the party had done or ommitted to do that which, under the circumstances, he was legally or morally bound to do or omit doing.

Simmons vs. Taylor, 23 Fed., 849.

An equitable estoppel arises when one party, by his faulty conduct, has induced his adversary to omit some act which but for said fault and negligence he would have performed and which if done might prevent a loss.

Wilson Sewing Machine Co. vs. Southern Express Co., 42 La. Ann., 593; 117 U. S., 108; 29 Law Ed., 816, supra.

Positive fraud is not required to work an equitable estoppel where silence or conduct has created a belief of the existence of a state of facts which it would be unconscionable to deny.

Alexander vs. Woodford, Spring Lake Fish Co., 12 Ky. Law Rep., 107.

A party by his declarations and conduct, and even by his silence or negative omissive act, may estop himself from claiming his rights where such claim would operate to the injury of another.

Trenton Banking Co. vs. Duncan, 86 N. Y., 228.

Wendell vs. Van Rensler, 1 John. Ch., 344.

The doctrine of estoppel in pais is applicable to one who has induced another to occupy a position he would not have occupied, or to omit doing an act he would have done but for the acts of the former and his declarations.

Heffner vs. Vandolah, 57 Ill., 520.
Tucker vs. Conwell, 67 Ill., 552.

Burke vs. Grant, 116 Ill., 124.
Faxton vs. Faxton, 28 Mich., 159.
Dickinson vs. Colgrove, 100 U. S., 578.

To constitute an estoppel in pais, actual fraudulent intent in making the representation is not necessary. It is enough that the person making it knows or ought to know the truth. That he intends or might reasonably anticipate that the person to whom it is made, or to whom it is communicated, will rely and act upon it as true; and that the latter has relied and acted upon it so that to permit the former to deny its truth will operate as a fraud.

Stevens vs. Ludlum, 46 Minn., 160; 48 N. W., 771; 13 Law Rep., Ann., 270.

The principle that no one should be permitted to deny that he intended the natural consequences of his acts, when he has induced others to act upon them, is as applicable to insurance companies as to individuals. The principle is one of sound morals, as well as one of sound law, and its enforcement tends to uphold good faith and fair dealing.

Ins. Co. vs. Wolf, 95 U. S., 330.
Tennant vs. Travelers' Ins. Co., 31 Fed., 323.

III.

We respectfully submit:

1st. That the petition in this case does not present any question of gravity and importance such as would warrant this Court in granting the prayer of the petition.

2d. That the Court of Appeals clearly stated the law relative to the questions involved in the case.

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